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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-681

HENRY ERNST

Petitioner

versus

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WAYNE D. MANCUSO
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Gretna, Louisiana
70053

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

HENRY ERNST

Petitioner

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Henry Ernst, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment affirming a judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, sentencing petitioner to six (6) years imprisonment, two years on each count.

OPINIONS BELOW

Trial was in the United States District Court for the Eastern District of Louisiana, New Orleans Division and was by jury.

The opinion and judgment of the court below is appended hereto as Appendix "A" and is also found in the Clerk's Record of the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of judgment sought to be reviewed and the time of its entry is October 3, 1972.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE, WHEREIN THE EVIDENCE WAS OBTAINED FROM HIS VEHICLE WITHOUT A SEARCH WARRANT, WHEREIN THERE WAS SUFFICIENT TIME TO SECURE A SEARCH WARRANT, WITHOUT AN ARREST WARRANT, WITHOUT THE CONSENT OF THE DEFENDANT, WITHOUT THE SEARCH BEING CONDUCTED INCIDENTAL TO AN ARREST, AND THE DEFENDANT NOT BEING ARRESTED UNTIL SEVERAL HOURS SUBSEQUENT TO THE SEARCH AND SEIZURE OF EVIDENCE, AND ACCOMPLISHED BY AN AGENT WHO HAD NO PREVIOUS CONTACT WITH THE DEFENDANT NOR HAD SUFFICIENT PROBABLE CAUSE TO SEARCH.

WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DISCOVERY OF VARIOUS STATEMENTS MADE BY THE DEFENDANT, INCULPATORY OR EXCULPATORY, TO GOVERNMENT AGENTS WHETHER, KNOWINGLY OR UNKNOWINGLY AT ANY TIME, OR PLACE, WHETHER OR NOT REDUCED TO WRITING.

3

3

WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A BILL OF PARTICULARS WHEREIN HE SOUGHT INFORMATION CONCERNING ALLEGED CO-CONSPIRATORS, OVERT ACTS, CAPACITY OF THE INDIVIDUALS INVOLVED IN THE ALLEGED CRIME AS TO WHETHER OR NOT THEY WERE WORKING FOR OR IN BEHALF OF THE UNITED STATES GOVERNMENT OR WERE ENFORCEMENT AGENTS, NAMES AND ADDRESSES OF PERSONS WHO ACTIVELY PARTICIPATED IN THE MATTER IN WHICH THE DEFENDANT STOOD ACCUSED AND OTHER ASPECTS OF THE MOTION WHICH WOULD HAVE AIDED THE DEFENDANT IN THE PREPARATION OF HIS DEFENSE OR THE LOCATION AND WHEREABOUTS OF WITNESSES.

A. Particularly wherein the trial revealed that the participants were two Federal undercover agents, a confidential employee under pending charges who had his expenses paid by the U. S. Government and received a suspended sentence after the defendant's arrest and a co-defendant who had initially instituted the entire transaction with the aid of the confidential employee and solicited the defendant's participation. Thereafter the Government ignored numerous violations of the co-operating co-defendant and he received a suspended sentence after testifying against the defendant.

4

WHETHER OR NOT THE COURT ERRED IN OVERRULING THE OBJECTION OF DEFENSE COUNSEL TO HEARSAY TESTIMONY GIVEN BY AGENT CLINT HOWARD. (Trial T. 94; Appendix 137-140)

5

WHETHER OR NOT THE COURT ERRED IN

4

OVERRULING DEFENSE COUNSEL'S OBJECTION TO HEARSAY TESTIMONY GIVEN BY THE WITNESS, AGENT CLINT HOWARD, (Trial T. 96; Appendix 137-140)

6

WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE INTRODUCTION OF EVIDENCE OVER THE ARGUMENT BY DEFENSE COUNSEL THAT A PROPER FOUNDATION FOR A CHAIN OF EVIDENCE HAD NOT BEEN ESTABLISHED. (Trial T. 202, et seq; Appendix 226-242)

7

WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE QUALIFICATION OF AGENT JOHN J. GIUFFRE, AS AN EXPERT WITH REGARDS TO COUNTERFEIT OBLIGATIONS AND THE TECHNICAL COMPOSITION OF SUCH PAPER DOCUMENTS, (Trial T. 206 thru 216; Appendix 225-242).

8

WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING A MOTION BY COUNSEL FOR DEFENDANT AT THE CONCLUSION OF THE TRIAL FOR A JUDGMENT OF ACQUITTAL ON THE GROUNDS THAT THE GOVERNMENT FAILED TO PROVE COUNT 1, COUNT 2 AND COUNT 3 OF THE CHARGES AGAINST THE DEFENDANT.

A. Particularly wherein the testimony of the Government witnesses revealed that, (1) that the negotiations to sell between the cooperating co-defendant, Tom Dunn Ray, a confidential employee, John Sistrunk and the undercover agent, Clint Howard, did not involve your petitioner, Mr. Ernst, nor was he present; (2) That the testimony of the Government's witness revealed that Mr. Ernst did not own or control the counterfeit obligations,

but rather the cooperating co-defendant did; (3) That petitioner was not to sell any counterfeit obligations nor was he to receive any of the proceeds of the sale; (4) That the confidential employee testified that the counterfeit obligations belonged to the cooperating co-defendant; (5) That the United States undercover agent testified at a previous motion hearing that he was making a sale from the confidential employee John Sistrunk, who was his own paid informer, (6) That no testimony or evidence was introduced by the Government to prove beyond a reasonable doubt that the defendant, Ernst was in actual physical possession of the counterfeit obligations in the New Orleans area; (7) That the indictment specifically stated that the defendant Henry Ernst sold to United States Agent Clint Howard certain counterfeit obligations, when in fact, at the conclusion of the transaction Agent Clint Howard did not receive counterfeit obligations, but rather another individual who was not named in the indictment, (8) That the undercover agent Clint Howard specifically testified that Henry Ernst did not sell him any counterfeit obligations on the date in question.

9

WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S MOTION AT THE CONCLUSION OF THE TRIAL FOR A JUDGMENT OF ACQUITTAL ON THE GROUNDS THAT THE INDICTMENT UPON WHICH THE DEFENDANT WAS PUT TO TRIAL WAS DEFECTIVE AND WAS NOT THE INDICTMENT UPON WHICH THE DEFENDANT HAD BEEN ARRAIGNED, (Trial T 227, et seq)

10

WHETHER OR NOT THE TRIAL COURT ERRED IN

DENYING DEFENSE COUNSEL'S REQUEST FOR A SPECIAL JURY INSTRUCTION NO. 1 ON ENTRAPMENT AND WHETHER OR NOT THE COURT ERRED IN NOT GIVING ANY INSTRUCTION ON THE LAW OF ENTRAPMENT WHATSOEVER, OR WHETHER OR NOT THE COURT ERRED IN NOT SUBMITTING TO THE JURY DEFENSE'S REQUEST FOR JURY INSTRUCTION NO.2 ON INFORMERS; OR WHETHER OR NOT THE COURT ERRED IN NOT SUBMITTING TO THE JURY DEFENSE'S REQUEST FOR JURY INSTRUCTION NO. 3 ON ACCOMPLICES.

SUCH CONTENTIONS OF ERROR BEING BASED ON THE FOLLOWING FACTS:

1. The Transaction to sell counterfeit obligations of the United States was initiated by a cooperating co-defendant and a confidential employee of the Government, who has pending charges dropped and received a suspended sentence on a remaining charge, after the defendant's arrest;

2. That defendant's co-defendant who turned out to be a cooperating co-defendant and the confidential employee who was a paid employee of the undercover agent, had criminal charges of counterfeiting against him pending, were close personal friends for many years.

3. That the confidential employee and the federal undercover agent traveled from the State of California to the States of Mississippi and Louisiana at the expense of the United States Government to engage in a transaction with the cooperating co-defendant Tom Dunn Ray, wherein in the undercover agent did purchase and made arrangements to purchase from his own confidential employee and paid informer counterfeit obligations of the United States to be supplied by the cooperating co-defendant.

4. That notwithstanding co-defendant was a supplier for the main printing source, had admitted to numerous counterfeiting violations, he assisted the Government in arrests of several individuals subsequent to his "alleged" arrest with your petitioner, testified against your petitioner and received a suspended sentence.

5. That the cooperating co-defendant, Tom Dunn Ray solicited and directed your petitioner into delivering the obligations to a certain spot pre-arranged by the confidential employee and the cooperating co-defendant in the presence of the petitioner.

6. Your petitioner was not involved in any negotiations, but rather the undercover agent, Clint Howard, the confidential employee, John Sistruck, who had pending charges against him which were eventually dropped, and the co-operating co-defendant, Tom Dunn Ray, testified at defendant's trial and received a suspended sentence, made all arrangements for a sale to be consummated between the cooperating co-defendant, the confidential employee and the undercover agent, wherein the undercover agent was to purchase from his own confidential employee counterfeit obligations of the United States, supplied by the cooperating co-defendant.

7. Reviewing all of the facts and circumstances of the case and considering that the defendant, Ernst was the only individual who received a penitentiary offense, notwithstanding the fact that his allege rule in the transaction was the most minute and minor one, would lead to the reasonable assumption that the possibility existed that he was entrapped into the transaction by his co-defendant, the confidential employee and the undercover agent, and that the cooperating co-defendant was

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working in behalf of the Government prior to the arrest of the defendant, Ernst. Sufficient facts therefore existed to warrant the trial court on instructing the jury on the matters contained in issue No. 10.

Such information was sought to be discovered by your petitioner in a Bill of Particulars which is the subject of the contention of error in Issue No. 3.

11

WHETHER OR NOT THE TRIAL COURT ERRED BY NOT INCLUDING IN ITS GENERAL CHARGE TO THE JURY LANGUAGE IN BEHALF OF THE DEFENSE CONCERNING CIRCUMSTANTIAL EVIDENCE TO THE EFFECT THAT THE JURY SHOULD ADOPT ANY REASONABLE HYPOTHESIS OF INNOCENCE WHEN DEALING WITH CIRCUMSTANTIAL EVIDENCE; THE THE GENERAL CHARGE WITH REFERENCE TO CONSPIRACY WAS NOT SUFFICIENT FOR JURY CONSIDERATION IN BEHALF OF THE DEFENDANT AND THAT OMITTED FROM SUCH CHARGES WERE MATTERS THAT NEGATED CONSPIRACY, SUCH AS INNOCENT MEETINGS OF PARTIES INVOLVED IN SOME OTHER SCHEME AND OTHER MATTERS, OR EXAMPLES THAT A JURY COULD RELATE AS TO SPECIFIC INCIDENTS NOT BEING A CONSPIRACY.

THE OMISSION IN THE GENERAL CHARGE OF THE COURT WITH REFERENCE TO POSSESSION, THAT NAKED POSSESSION IS NOT SUFFICIENT IN ITSELF, THAT THERE MUST BE KNOWLEDGE AND INTENT BY THE INDIVIDUAL CHARGED WITH SAID POSSESSION;

THAT SAID CHARGE WITH REFERENCE TO POSSESSION DID NOT CONTAIN ANYTHING THAT WOULD ALLOW A JURY TO FIND TO THE CONTRARY, BUT RATHER THE COMPLETE CHARGE WAS PRO-POSSESSION;

THAT THERE WAS NOT SUFFICIENT LANGUAGE IN THE CHARGE WITH REFERENCE TO SELLING,

TRANSFERRING, DELIVERING COUNTERFEIT OBLIGATIONS, THAT WOULD INDICATE TO THE JURY THAT THE ESSENTIAL ELEMENT OF THE CRIME IS KNOWING THE OBJECT TO BE DELIVERED TO BE COUNTERFEIT WITH SPECIFIC INTENT TO DEFRAUD;

THAT THE GENERAL CHARGE WITH REFERENCE TO AIDING AND ABETTING WAS INSUFFICIENT AND WAS PRO-PROSECUTION AND CONTAINED NOTHING THAT THE JURY COULD CONSIDER IN BEHALF OF THE DEFENDANT.

12

WHETHER OR NOT THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE INDICTMENT ON WHICH THE TRIAL WAS CONDUCTED, BUT WAS NOT THE INDICTMENT UNDER WHICH THE DEFENDANT WAS ARRAIGNED

13

WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S POST TRIAL MOTIONS OF (1) MOTION TO ARREST JUDGMENT, (2) MOTION TO DISMISS THE INDICTMENT; (3) TO SET ASIDE THE VERDICT OF THE JURY AND ENTER A JUDGMENT OF ACQUITTAL, (4) MOTION FOR A NEW TRIAL, (5) MOTION TO QUASH THE INDICTMENT (6) MOTION TO DECLARE THE PROCEEDINGS WHEREIN THE DEFENDANT WAS CONVICTED A MISTRIAL (7) MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT, AND (8) MOTION FOR A NEW TRIAL.

STATUTES INVOLVED

Involved is Title 18 U.S. Code, Section 371, 472, and 473. It is set forth in Appendix "B".

STATEMENT OF THE CASE

Petitioner, Henry Ernst, was convicted on his plea of Not Guilty and a jury verdict of

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guilty of violating Title 18 U.S. Code, Section 371, 472 and 473, a three count indictment contending conspiracy, possession and transferring of counterfeit obligations of the United States.

Trial was held in the United States District Court for the Eastern District of Louisiana, New Orleans Division, Sentence imposed was imprisonment under the custody of the United States Marshal for a period of six (6) years on counts one, two and three, each to run concurrently with count one.

Notice appeal was timely filed. The judgment was affirmed on October 3, 1972.

STATEMENT OF FACTS

It is the Government's contention that in July, 1970, Tom Dunn Ray, a previous co-defendant in the instant case who subsequently pled guilty after his arrest and became a Government witness against your petitioner, Henry Ernst and assisted the Government in numerous arrests after the arrest of Henry Ernst became involved in the business of counterfeiting money with one, John Stieglitz of Baton Rouge, Louisiana, the home town of Tom Dunn Ray.

That sometime after July, 1970, and before December 1970, Tom Dunn Ray made contact with another friend and resident of the City of Baton Rouge, Louisiana, one John Sistrunk in the State of California.

That between September 1970, and December 1970, Tom Dunn Ray on several occasions supplied John Sistrunk, while in the State of California with various amounts of counterfeit obligations printed by John Stieglitz in the

City of Baton Rouge, Louisiana.

Allegedly unknown to Tom Dunn Ray, John Sistrunk had counterfeit obligation transactions with an agent of the United States Treasury Department, one Clint Howard.

That eventually in December, 1970, John Sistrunk, after having engaged in counterfeit transactions with a Federal Agent and having pled guilty, but prior to being sentenced was cooperating with members of the United States Treasury Department, more specifically with Agent Clint Howard in an effort to obtain counterfeit obligations.

That sometime during the month of December, 1970, Tom Dunn Ray and John Sistrunk made contact and arranged to meet in Jackson, Mississippi with Agent Clint Howard to effectuate the purpose of counterfeit obligations of the United States.

That John Sistrunk, Agent Clint Howard and Tom Dunn Ray met in Jackson, Mississippi, in December, 1970, and effectuated a sale between Tom Dun Ray and Agent Clint Howard.

That said transaction also involved one, Charles Stead.

That according to testimony of Tom Dunn Ray, in order to complete counterfeit transaction between Agent Howard and the individual by the name of Charles Stead, it was necessary to exchange the denominations of the bills.

Allegedly, Tom Dunn Ray contacted by telephone the petitioner, Henry Ernst and asked Ernst to deliver to Jackson, Mississippi, the proper denominations of the

counterfeit bills that had previously been deposited with him by Tom Dunn Ray. For this delivery, the petitioner was to receive the sum of Five Hundred and no/100 ($500.00) Dollars.

All Government witnesses involved in the transaction in Jackson, Mississippi, testified that Mr. Ernst did not take part in any of the negotiations that were carried on, nor did he sell any counterfeit obligations to anyone, but merely delivered certain denominations at the request of Tom Dunn Ray. A sale was consummated between Ray, Sistrunk and Howard.

That after the transactions were completed in Jackson, Mississippi, between Agent Clint Howard, John Sistrunk and Tom Dunn Ray, the three individuals agreed to engage in further transactions at a later date as soon as the printer could produce the quantity and denominations of the bills requested by Mr. Sistrunk and Agent Clint Howard.

In January, 1971, Tom Dunn Ray called Sistrunk and Howard in California, and made arrangements to meet them at the Fountainbleu Motel on Tulane Avenue, in New Orleans, Louisiana, for the purpose of completing a sale of One Hundred Thousand no/100 ($100,000.00) Dollars in counterfeit obligations for the sum of Ten Thousand and no/100 ($10,000.00) Dollars, in cash.

On January 25, 1971, according to Tom Dunn Ray's testimony, he contacted the petitioner, Henry Ernst, and told him to go to Baton Rouge, Louisiana, to a certain Volkswagon vehicle owned by the printer of the counterfeit obligations, Mr. John Stieglitz and to retrieve from that vehicle a package which allegedly contained counterfeit

obligations. Ernst was to return the money to New Orleans and hold it until it was requested by Ray. Ray testified that his reasons for having Ernst act as a delivery boy was to avoid being caught with the counterfeit obligations.

On January 26, 1971, Tom Dunn Ray, John Sistrunk and Clint Howard met at the Fountainbleu Motel on Tulane Avenue in New Orleans, Louisiana, and therein agreed that Tom Dunn Ray would sell to Clint Howard One Hundred Thousand and no/100 ($100,000.00) Dollars in counterfeit obligations for the sum of Ten Thousand and no/100 ($10,000.00) Dollars, in cash. Petitioner, Henry Ernst was not a part of this transaction, conversation or meeting.

It was also decided at that meeting that the counterfeit obligations would be deposited at a certain location where they could be picked up and subsequent to Agent Howard coming into possession of said obligations for examination, he would meet Tom Dunn Ray at another restaurant, the Pitt Grill in the adjacent Parish of Jefferson and complete the transaction by delivering $10,000.00 in cash.

After the meeting between Tom Dunn Ray, John Sistrunk and Clint Howard, Sistrunk and Ray then contacted the petitioner, Henry Ernst, to inform him as to where he was to deliver the money and the manner in which it was to be delivered.

John Sistrunk and Tom Dunn Ray picked up Henry Ernst in John Sistrunk's vehicle and drove around looking for a suitable place where the counterfeit obligations were to be deposited and retrieved by Agent Clint Howard.

It was decided that the counterfeit

obligations be contained in Henry Ernst's El Camino Chevrolet Pick Up truck and parked in Schwegmann's Super Market parking lot in the 8000 block of Airline Highway in Jefferson Parish, Louisiana.

Several hours later, Agent Clint Howard and John Sistrunk passed through the parking lot of Schwegmann's Super Market and saw Tom Dunn Ray's vehicle and an El Camino Chevrolet Pick Up truck with a garbage can in the rear of it, allegedly belonging to Henry Ernst, and the individual Henry Ernst standing in front of the supermarket, some 50 yards away from the parked pick up truck.

While passing the defendant Henry Ernst, John Sistrunk and Clint Howard stopped the automobile momentarily, had a brief conversation with the defendant and then left.

John Sistrunk and Clint Howard then drove to the Hilton Inn Motel in Kenner, Louisiana, with is approximately five miles from Schwegmann's Super Market where they met another agent of the United States Treasury Department one Raymond A. Shaddick.

Agent Howard left the vehicle of John Sistrunk and retired into the Hilton Inn Motel, Agent Shaddick got into a vehicle of his own and followed John Sistrunk into the parking lot of Schwegmann's Supermarket.

While driving through the parking lot, John Sistrunk motioned to an El Camino Chevrolet pick up truck containing a garbage can in the rear and Agent Shaddick stopped his vehicle, alighted from it and entered into the cab of the pick up truck, retrieved a package from the rear seat and returned to his vehicle.

Once inside his vehicle he tore a corner of the package and saw that it contained what appeared to be counterfeit obligations.

Agent Shaddick then drove back to the Hilton Inn Motel, in Kenner, La., where he met Agent Howard and delivered the counterfeit obligations.

At approximately 3:30 oclock p.m., according to their previous negotiation and plans, Agent Clint Howard met Tom Dunn Ray at the Pitt Grill restaurant in Jefferson Parish, Louisiana for the alleged purpose of delivering him the sum of $10,000.00 in cash.

As agent Howard and Tom Dunn Ray left the restaurant to go to Agent Howard's vehicle to obtain the money, Tom Dunn Ray and Agent Howard were arrested by Agents of the United States Treasury Department.

Later on that night the defendant Henry Ernst was arrested by numerous agents of the United States Treasury Department at his home and taken into custody.

On January 26, 1971, a complaint was filed before the United States Magistrate Harry Lee, by William E. Copeland, Special Agent of the United States Secret Service, as follows:

> "That on or about January 26, 1971, at Kenner, La. and Jefferson Parish, La., in the Eastern District of Louisiana (1) Henry Ernst did knowingly, willfully and unlawfully and with intent to defraud, have in his possession certain counterfeit obligations of the United States, to-wit: Approximately $100,000.00 in $20 Federal Reserve Notes,

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> purportedly drawn on the Federal Reserve Bank of San Francisco, Calif., Series 1969, check Letter "H", fact plate 10; back plate "46", bearing serial number L 12759113A and others; and further did transfer said counterfeit obligations of the United States with the intent that the same be passed, published or used as true and genuine, to one Raymond A. Sahddick with all intent to defraud the United States Government.
>
> And the complainant states that this complaint is based on personal observation by agents of the United States Secret Service that the defendant did have in his possession and did transfer the above described counterfeit obligations to one Raymond A. Shaddick and is also based upon information from a confidential informant who has provided reliable information in the past; that Henry Ernst would be in possession of the above described counterfeit obligations at Schwegmann's Food Store, Airline Highway, on January 26, 1971.

The entire complaint is set forth in the statement of the case for it will be shown that the factual aspects as set forth in the complaint differ from the subsequent indictments returned by the United States Grand Jury.

In the matter of the United States of America v. Henry Ernst and Tom Dunn Ray, Criminal Action No. 71-59, a Federal Grand

Jury sitting in the New Orleans Division of the United States District Court for the Eastern District of Louisiana, returned an indictment against Henry Ernst and Tom Dunn Ray for violation of Title 18 U.S.C. 472 and 473.

On March 17, 1971, the United States Court for the Eastern District of Louisiana, New Orleans Division, the Honorable Fred Cassibry presiding, the two defendants, Henry Ernst and Tom Dunn Ray, were arraigned on the aforementioned indictment and entered a plea of not guilty.

Pre-trial motions for Discovery, Bill of Particulars and Motion to Suppress Evidence were heard and denied on June 30, 1971, in the United States District Court for the Eastern District of Louisiana, New Orleans Division, the Honorable Fred Cassibry, presiding.

On November 1, 1971, trial was commenced against Henry Ernst only, his co-defendant, Tom Dunn Ray, having previously pled guilty and agreed to be a Government witness against Henry Ernst, and prior to the trial of Henry Ernst, had operated in behalf of the United States Government in effectuating the arrest of individuals involved in counterfeit obligations in the City of Baton Rouge, Louisiana.

The defendant Ernst was put to trial in Criminal Action No. 71-148, which was based upon a subsequent indictment, rather than the one he pled to, and was an indictment that he had never been arraigned upon.

Your Petitioner Ernst has been arraigned in criminal action No. 71-59 on March 17, 1971, and had pled not guilty therein. The indictment contained in criminal action No. 71-148 had never been served upon the

petitioner, Ernst or his counsel, nor was the petitioner Ernst ever arraigned upon the indictment contained in criminal action No. 71-148.

After two days of trial, your petitioner Ernst was found guilty on all three counts of the indictment.

At the conclusion of said trial a verbal motion for a Judgment of Acquittal on the grounds that the Government had failed to prove its case and that the petitioner had been put to trial on an indictment other than the one upon which he had been arraigned and upon one which he had never been arraigned. The motion was denied.

At the conclusion of the trial and at the proper time counsel requested of the court to give special charges to the jury, one of which included the charge of entrapment was delivered to the jury. Objections to various parts of the general charge were also denied.

On January 19, 1972, post trial motions to arrest judgment, to dismiss the indictment, to set aside the verdict of the jury and to enter judgment of acquittal, new trial, quash the indictment, to declare the proceedings wherein the petitioner was convicted a mistrial, for Judgment of acquittal notwithstanding the verdict and/or motion for a new trial were heard.

After taking the matter under advisement, the Court denied all post trial motions on the 21st day of January, 1972, and the defendant, Henry Ernst, was sentenced to a term of six years imprisonment on all three counts.

Proper notice of appeal was filed and

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within the time specified by law appeal was taken to the United States Court of Appeals for the Fifth Circuit, wherein the matter was placed upon the summary docket and judgment affirmed without opinion, on October 3, 1972.

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

1. WHETHER THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE, WHEREIN THE EVIDENCE WAS OBTAINED FROM HIS VEHICLE WITHOUT A SEARCH WARRANT, WHEREIN THERE WAS SUFFICIENT TIME TO SECURE A SEARCH WARRANT, WITHOUT AN ARREST WARRANT, WITHOUT THE CONSENT OF THE DEFENDANT, WITHOUT THE SEARCH BEING CONDUCTED INCIDENTAL TO AN ARREST, AND THE DEFENDANT NOT BEING ARRESTED UNTIL SEVERAL HOURS SUBSEQUENT TO THE SEARCH AND SEIZURE OF EVIDENCE, AND ACCOMPLISHED BY AN AGENT WHO HAD NO PREVIOUS CONTACT WITH THE DEFENDANT NOR HAD SUFFICIENT PROBABLE CAUSE TO SEARCH.

Subsequent to petitioner's arrest, but prior to his trial, various pre-trial motions were filed included therein a Motion to Suppress the alleged counterfeit obligations seized from a vehicle owned by the petitioner (Appendix 29)

On June 30, 1971, in the United States District Court for the Eastern District of Louisiana, New Orleans Division, the Honorable Fred J. Cassibry Judge, presiding, a hearing was conducted for the purpose of suppressing the evidence in the instant matter, said motion presented by petitioner denied, (Appendix 42).

During the proceedings conducted on pre-trial motions on June 30, 1971, agents of the United States Government testified that they

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had previously negotiated with Mr. Tom Dunn Ray to purchase counterfeit obligations of the United States. These negotiations took place between Agent Clint L. Howard, Tom Dunn Ray and John Sistrunk, an individual who was working in behalf of the United States Government during the entire transaction. Raymond Shaddick, the individual who subsequently removed the counterfeit obligations from the petitioner's truck had not negotiated in any manner whatsoever with the petitioner.

During the course of negotiations between Agent Howard, Tom Dunn Ray and John Sistrunk, Agent Howard was informed by John Sistrunk that a Chevrolet El Camino pick up truck would be parked in the parking lot of Schwegmann's Super Market in the 8000 block of Airline Highway in Jefferson Parish, La., That inside the truck would be a package of counterfeit obligations of the United States which were the subject of the sale between Tom Dunn Ray and Agent Clint L. Howard.

It is well to note that John Sistrunk was operating in behalf of the United States Government during this transaction and was in effect, though not an agent, a partner of Agent Clint Howard. That John Sistrunk had "set up the deal" between Agent Clint Howard and Tom Dunn Ray. That John Sistrunk and Tom Dunn Ray with the petitioner present had selected the sight where the transfer of the counterfeit obligations was to take place. As will be emphasized in argument on other issues the petitioner, Henry Ernst was a delivery man who was supposed to deliver the counterfeit obligations to this particular sight and was not a part of sales transaction, did not own any of the counterfeit obligations to be transferred, and was not to share in the proceeds of the sale.

After a morning meeting on January 26, 1971, at the Fountainbleu Motel between Agent Clint Howard, John Sistrunk and Tom Dunn Ray, Agent Clint Howard was informed by John Sistrunk that an El Camino Chevrolet pick up truck would be parked in the rear of the aforementioned parking lot later on that afternoon and would contain the counterfeit obligations.

Several hours later, John Sistrunk and Agent Howard passed the designated spot and testified that they did in fact, see the described vehicle parked in the designated spot and then some 50 yards away standing in front of the super market saw the petitioner, Henry Ernst.

According to Agent Howard's testimony, he stopped very briefly and informed the petitioner, Henry Ernst that there would be some delay and then continued on to the Hilton Inn Motel approximately five miles away where he met with Agent Raymond Shaddick.

The information that the counterfeit obligations would be contained in the El Camino pick up truck relayed to Agent Howard by his confidential informant, John Sistrunk, was then further relayed to Agent Raymond Shaddick.

Agent Shaddick then followed John Sistrunk in another vehicle to the parking lot wherein John Sistrunk pointed to the designated vehicle in a sufficient manner that Agent Shaddick could see and continued on about his way. Agent Shaddick stopped his vehicle entered the pick up truck retrieved a package and then returned to his vehicle where he inspected the package and discovered that it contained counterfeit obligations of the

United States.

Agent Shaddick then returned to the Hilton Inn Hotel where he met once again with Agent Howard and delivered the counterfeit obligations to him.

Based upon this sequence of events as to the manner in which the property was seized from the vehicle allegedly owned by the petitioner, Ernst, petitioner filed a Motion to Suppress on the grounds that the search was not conducted with a search warrant, that it was not conducted incidental to a lawful arrest for the petitioner was not arrested until later that night, that it was not conducted with the consent of the petitioner, nor was there sufficient probable cause on the part of Agent Shaddick to conduct a search; had they attempted to do so and that the circumstances were not of such a nature under the law to warrant such a search of the vehicle without a warrant.

The Fourth Amendment of the Constitution provides:

> "The right of the people to be secured in their persons houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The protection guaranteed by the Fourth Amendment is implemented primarily by the "Exclusionary Rule," the rule that evidence that has been illegally seized cannot be

admitted in evidence.

Terry v. State of Ohio, 88 S.Ct. 1868, 1875; 392 U.S. 1, 12; 20 L.Ed 2d 889.

Rule 41 of the Federal Rules of Criminal Procedure provides:

> "A search warrant authorized by this section E of Rule 41 of the Federal Rules of Criminal Procedure provides, 'A person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for the return of the property and to suppress the use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant, or (2) the warrant is insufficient on its fact, or (3) the property seized is not that described in the warrant, or (4) there was no probable cause for believing the exitence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed ***"

The words of Justice Jackson, speaking for the Court in Johnson v. U. S. 68 S. Ct. 367; 333 U.S. 10; 92 L Ed. 436, have been often quoted and are highly authortive:

> "The point of the Fourth Amendment, which often is not grasped by zellous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and

> detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of fretting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nultity and leave the peoples homes secure only in discretion of police officers ***"

The Court has repeatedly indicated its adherence to that principal of law. Jones v. U.S., (1958) 78 S.Ct. 1253, 1256-1257; 357 U.S. 493, 497-499; Chapman v. U.S., (1961) 81 S.Ct. 776, 778-779; 365 U.S. 610, 613-616; Aguillar v. State of Texas (1964) 84 S. Ct. 1509, 1512; 378 U.S. 108, 110-112; Katz v. U.S. (1967) 88 S. Ct. 507; 514-515; 389 U.S. 347, 356-359.

In the instant matter, the officers had not obtained a search warrant for the vehicle in question nor were they in possession or had issued at the time of the search an arrest warrant for the petitioner, Henry Ernst, nor did the petitioner consent at any time to the search of his person, vehicle or residence by any law enforcement agency with the unequivocal knowledge and intent required by law. Judd v. U.S. 89 U.S. App. D.C. 64, 66; 190 F.2d 649, 651.

Therefore, if the search is to stand in the instant matter, it must be based on whatever rights the agent had to search the petitioner's vehicle without a search warrant.

Searches conducted outside the judicial

process, without prior approval by a judge or magistrate, are per say unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions, such as searches incident to a lawful arrest or searches with the suspect's consent, Katz v. U.S. 389 U.S. 347; 88 S. Ct. 507.

A further exception is made to the requirement of a warrant in the case of; Carroll v. U.S. (1925), 45 S.Ct. 280, 285; 267 U.S. 132, 153, as follows:

> "Search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicably to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

However, this exception does not apply automatically to any case of a movable vehicle. The officer must reasonably thought it impracticably to obtain a warrant. As related in Wrent v. U.S. CA 5th (1954) 209 F 2d 893, 899.

> "We think that one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take the decision into his own hands. The officer had ample opportunity to apply for a search warrant and in

> our opinion a search of the automobile without a warrant was not justified."

In the instant case, the location of the vehicle, the time that the vehicle was to be at the location, the manner in which the goods were to be concealed in the vehicle were all controlled by the Federal Agent and his confidential informant. Not only did they know several hours in advance as to where and when the vehicle would be, its description and contents, but they also were instrumental in having the vehicle remain there for a longer period of time until they could arrange for another agent to pick up the contraband. (Appendix 50)

Under such circumstances the vehicle was not in the process of being moved, nor was there any danger that the evidence would be destroyed and as such, no exigent circumstances existed.

Even if there is probable cause for the seizure or search of an automobile and in this case such probable cause is denied for the agent who actually conducted the search did not have any contact with the petitioner and received second hand knowledge of the vehicle to be searched and was simply operating as a searching implement without being in possession of the necessary facts to establish probable cause for his personal search, a search of the automobile without a valid warrant is unconstitutional unless there are exigent circumstances making it impracticable to obtain a warrant; the opportunity for search is not so fleeting as to furnish such exigent circumstances where the police had advance knowledge of the existence and location of the automobile, planned all along to

seize it, and had ample opportunity for obtaining a warrant, Coolidge v. New Hampshire, 403 U.S. 443; 91 S.Ct. 2022. The Court further ruled in Coolidge that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest and that no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.

In the matter Trupiano v. U.S.A. 334 U.S. 699, a majority of the court in an opinion by Murphy J. in which four other justices joined, held that the evidence obtained by the seizure should have been suppressed, on the ground that the search was made without a search warrant which there was ample opportunity to obtain.

In the instant matter neither Agent Howard or Agent Shaddick had negotiated with the petitioner Ernst with regards to the transfer of the counterfeit obligations. That their only knowledge that the obligation would be contained in that particular automobile at that particular place, at that particular time came from their informer, John Sistrunk, who had arranged along with another individual a contraband material to be in that vehicle at that location, at that time. The knowledge of which was possessed by Agent Howard several hours prior to the search and seizure.

It is well to note that the search took place in mid afternoon on Tuesday, January 26, 1971, by arrangement. It is unnecessary to list the numerous Federal Judges and Magistrates in the New Orleans Area who could have issued such a warrant, had proper application been made, or to account for the numerous Judges and Justices of the Peace in the 24th Judicial District of the State of Louisiana,

wherein the search was conducted, that were available to execute a search warrant had proper application been made.

The agents had advanced knowledge of the search and the location and indeed had determined the location and time themselves and had every opportunity to obtain a warrant had they so attempted to do so. Their failure to do so renders the ensuing search made without warrants and not incident to a lawful arrest, for the arrest took place several hours later, and without the consent of the defendant or under circumstances of an emergency nature absolutely void and in contradiction of the Fourth Amendment to the Constitution of the United States, and Rule 41 of the Federal Rules of Criminal Procedure, and as such the evidence should have been suppressed when the matter was properly brought before the District Court.

The right of privacy must reasonably yield to the right of search, there must be decided, as a rule, by a judicial officer and not by a policeman or government enforcement agent. Johnson v. U.S. 333 U.S 13,15; 68 S.Ct. 368, 369.

2. WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DISCOVERY OF VARIOUS STATEMENTS MADE BY THE DEFENDANT, INCULPATORY OR EXCULPATORY, TO GOVERNMENT AGENTS WHETHER, KNOWINGLY OR UNKNOWINGLY AT ANY TIME, OR PLACE, WHETHER OR NOT REDUCED TO WRITING.

The petitioner sought to obtain prior to trial any and all confessions admissions, and/or statements made by any co-defendant to the United States Attorney or other law enforcement agency at any time or place which incriminates or inculpates the petitioner which

have been reduced to writing or not.

It was later discovered that a co-defendant, Tom Dunn Ray, did in fact, make various statements, written and otherwise to Government agents, and the United States Attorney implicating the petitioner, Henry Ernst. That these statements should have been produced for the inspection by the petitioner for proper defense of his case.

Further, the petitioner had requested any and all other confessions, admissions and/or statements, inculpatory or exculpatory made by the petitioner to the Government agents whether knowingly or unknowingly at any time or place, whether reduced to writing or not (Appendix 27).

It was discovered during the course of the trial that confidential informant, John Sistrunk related various conversations that he had with the petitioner Henry Ernst, that the co-defendant, who was cooperating with the Government related conversations that he had with the petitioner, Henry Ernst and that Agent Clint Howard of the United States Treasury Department related a conversation he had with the petitioner in front of the Schwegmann's Super Market.

That all of these statements whether culpatory or inculpatory, though verbal in the nature may have sometime been reduced or paraphrased to writing in the Statements of John Sistrunk, Tom Dunn Ray and Agent Howard the manner in which they were presented at the trial of the matter strongly influenced the jury as to the involvement of the petitioner and therefore he was entitled to be informed that the Government intended to use these alleged statements and/or conversations

against him on the trial of the matter and should have produced the context of such statements so that he could have been prepared to rebut them if he felt necessary.

The failure of the Court to order the United States Attorney to produce the said statements was error and severely restricted the petitioner in his defense of his cause.

3. WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A BILL OF PARTICULARS WHEREIN HE SOUGHT INFORMATION CONCERNING ALLEGED CO-CONSPIRATORS, OVERT ACTS, CAPACITY OF THE INDIVIDUALS INVOLVED IN THE ALLEGED CRIME AS TO WHETHER OR NOT THEY WERE WORKING FOR OR IN BEHALF OF THE UNITED STATES GOVERNMENT OR WERE ENFORCEMENT AGENTS, NAMES AND ADDRESSES OF PERSONS WHO ACTIVELY PARTICIPATED IN THE MATTER IN WHICH THE DEFENDANT STOOD ACCUSED AND OTHER ASPECTS OF THE MOTION WHICH WOULD HAVE AIDED THE DEFENDANT IN THE PREPARATION OF HIS DEFENSE OR THE LOCATION AND WHEREABOUTS OF WITNESSES.

A. Particularly wherein the trial revealed that the participants were two Federal undercover agents, a confidential employee under pending charges who had his expenses paid by the U. S. Government and received a suspended sentence after the defendant's arrest and a co-defendant who had initially instituted the entire transaction with the aid of the confidential employee and solicited the defendant's participation. Therefore, the Government ignored numerous violations of the cooperating co-defendant and he received a suspended sentence after testifying against the defendant.

Prior to trial of the instant matter, petitioner submitted a bill of particulars

containing therein thirty-six specific particulars, (Appendix 32, 37).

On June 30, 1971, after a hearing on the matter, all particulars were denied.

Without setting forth herein each particular, counsel refers this Honorable Court to pages 32 through 37 of the Appendix wherein each particular is listed and offers the following authorities in behalf of each particular.

The defendant's right to compulsory process has been construed as including a right to discovery. 58 Mich. Law Review, 888, 893 (1960); 38 Tex Law Review, 595, 608 (1960); 31 So. Cal. Law Review, 78, 82 (1957); 9 Syracuse Law Review 95, 98 (1957)

> "There is no privilege which puts beyond the reach of compusory process evidence in the possession of police of prosecuting authorities bearing upon a truth of a fact in issue in criminal cases. The suppression by this means of evidence upon which the innocence of the accused might depend would infringe his constitutional rights and offend against the plainest principal or justice and policy."

State v. Cooper (1949), 2 N.J. 450; 67 A 2d 298, noted in 41 J. Crim L and Criminology 64, 1950.

When the Government chooses to prosecute a person, the right of that person to meet the charges against him or introducing documents relevant to his defense cannot be subjected to the control of the Government. Whenever the Government claim of privilege conflicts with

the right of the defendant to have compulsory process, the Government must decide whether the public prejudice or permitting the crime to go unpunished is greater than the prejudice in disclosing confidential information in the possession of the Government which might be relevant to the defense.

U. S. v. Schneiderman (1952) D.C. Cal 106 Fed Supp 731, 738. Further the right to compulsory process may be closely linked with discovering inspection under Rule 17 (c). A Court of appeals has stated:

> "Rule 17 (c) is a statutory method of implementation of the Sixth Amendment."

U.S. v. Echeles (1955) CA 7 Ill. 222 F 2d 144, 152, Cert. Den. 350 U.S. 828.

In the exercise of sound discretion of the court a bill of particulars may be issued to aid a defendant who requires further details to prepare for trial. U.S. v. Koeing (1962) CA 6 Ohio 300 F 2d 377; U.S. v. Merrick (1962) D.C. Mo. 207 F. Supp 929. Thus a defendant may require the disclosure of matters connecting him with the conspiracy. U.S. v. Nomura Trading Co. (1963) D.C. NY 213 F.Supp 704. The particulars of overts acts, U.S. v. Kahaner, (1962) D.C. NY 203 F. Supp 78. The names and addresses of co-conspirators who became known to the Government subsequent to the indictment and the present and last known addresses of a co-defendant.

The Government may be required to furnish a Bill of Particulars revealing the names of the persons named as co-conspirators in the indictment who acted as agents for or at the instance of the Government during the period of the alleged conspiracy, U.S. v. Williams

(1969) D.C. Ga. 309 F. Supp 32. Further disclosure may be had by Bill of Particulars of the identity of persons who are participants in, or victims of a crime. U.S. v. Palmisano (1967) D.C. Pa. 273 F. Supp 750. Additionally, a defendant charged with a narcotic violation was entitled to a bill of particulars informing him as to the time, place and names of the persons from whom it is alleged that he received and procured the drug, U.S. v. Acarino (1967) D.C. NY 270 F. Supp 526.

In those particulars dealing specifically with information concerning an informant or special employee, the Courts have found that when evidence of the identity of the informer becomes important to the establishment of the defense, the trial judge will require the disclosure. White v. U.S. (1964) CA 8 Mo. 330 F 2d 811, U.S. v. Hanna (1965) CA 6 Ky. 341 F 2d 906, U.S. ex rel Coffey v. Fay (1964) D.C. NY 234 F Supp 543. Further, Romario v. US. 353 U.P.S. 53, 54; 77 S.Ct. 623, the court held that informer who participates in the case (not merely supplying information) must be disclosed. Reported further in 24 Berkley Law Review 144 (1957); 46 Cal Law Review 467 (1958); 71 Harvard Law Review 111 (1957); 26 Tenn Law Review 308 (1959); Also, in People v. Collier, (1963) CA 7 Ill. 313 F 2d 157 cert den 374 U.S. 844, where the defendant in a narcotics case tried three times to subpoena a special employee of the Bureau of Narcotics, participated in his arrest and the Government claimed that neither it nor its agents knew the whereabouts of the special employee, the court erred in failing to persist in attempting to determine whether the Government knew the employee's whereabouts or it could find out where he was. And further if the defense of unlawful entrapment is interposed, a new trial may be granted if the prosecution does not offer as a witness a paid

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informer on whose entraping activities the conviction rests. U.S. v. Ramsey (1963) D.C. Tenn 220 F. Supp 86.

And in U.S. v. Larmar (1964) CA 6 Mich, 337 F. 2d 349, the court concluded that disclosure of the informer's identity is required in those cases where it is essential to a fair determination of the case and material to the ends of justice. "Where necessary, the name of the person to whom narcotics were sold may be obtained by a Bill of Particulars".

In support of particulars Nos. 8, 11, 12, 18, 19, 20, 22, 33, 34, 35, 36, a bill of particulars may be issued to aid a defendant who requires further details to prepare for trial and may require the disclosure of matters connecting him with the conspiracy and particulars of overt acts. U.S. v. Merrick (1962) D.C. Mo. 207 F. Supp 929; U.S. v. Nomura Trading Co. (1963) D.C. NY 213 F. Supp 704; U.S. V. Kahaner (1962) D.C. NY 203 F. Supp 78. Further, petitioner is entitled to what information the Government has that is in his behalf and ". . . a duty of disclosure operates even before a request is made, as a duty to preserve all that might be subject to defense discovery." Bryant v. U.S., citing Brady v. Md., 373 US 83. Also, a defendant is entitled to a Bill of Particulars informing him as to the time, place, names of persons from whom it is alleged he received and procured the contraband. U.S. v. Acarino (1967) D.C. NY 270 F. Supp 526.

The current tendency in the criminal law as evidenced by Rule 16 as amended, is in the direction of discovery of facts before trial and elimination of surprise at the trial. Gregory v. U.S. (1966) 125 App. DC 140, 369

F. 2d 185. Under the revised rules when a defendant properly makes a claim for inspection under Rule 15 (a) (3 or B) discovery normally will be granted unless special reasons exist justifying the preservation of secrecy. U.S. v. Hughs (196) CA 5 Tex 413 F 2d 1244. Further a proceeding under Rule 16 may be used in conjunction with a proceeding under the rule allowing for a Bill of Particulars, U.S. v. Sermon (1963) D.C. Mo. 218 F. Supp. 871.

4. WHETHER OR NOT THE COURT ERRED IN OVERRULING THE OBJECTION OF DEFENSE COUNSEL TO HEARSAY TESTIMONY GIVEN BY AGENT CLINT HOWARD (Trial T. 94; Appendix 137-140)

5. WHETHER OR NOT THE COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO HEARSAY TESTIMONY GIVEN BY THE WITNESS, AGENT CLINT HOWARD (Trial T. 96; Appendix 137-140)

During the course of direct examination of Agent Clint Howard he began to relate conversations that he had with another individual wherein the petitioner's name was mentioned and activities the petitioner was supposed to perform, although the petitioner was not present during this conversation, nor had the petitioner had any conversation with Agent Howard as to anything he was supposed to or not do, yet Agent Howard's testimony was reciting what someone else told him as the future activities of the petitioner, Ernst. (Appendix 137-139)

In addition to the testimony of Agent Howard in this particular instance being hearsay and then some matters being rank hearsay, it was very damaging in that this exchange took place in the very beginning of the trial and firmly suggested to the jury

that Henry Ernst had been part of the conspiracy and the negotiations to sell and transfer counterfeit obligations, when in truth and in fact, as will be shown in discussion of other issues, Henry Ernst had no negotiations with Agent Clint Howard or anyone else with reference to the sale of counterfeit obligations, but according to the testimony of the Government's own witnesses, which occurred later on in the trial was merely instructed to pick up a package in Baton Rouge, by Tom Dunn Ray and have it placed in his truck in Schwegmann's Parking lot at the instructions of Tom Dunn Ray and John Sistrunk, the cooperating undercover man for the U.S. Agents.

This initial testimony on the part of Agent Clint Howard began the jury to immediately think in terms of the fact that the petitioner was a part of those negotiations he was relating and was in fact going to be the individual who was going to do the selling.

It is difficult to determine what prejudicial effect this connotation of the testimony had upon the jury in its ultimate deliberations.

Furthermore, it was not contended by the Government that Henry Ernst possessed any counterfeit obligations in the State of Mississippi or sold any counterfeit obligations in the State of Mississippi or performed any overt act in the State of Mississippi or conspired specifically in the State of Mississippi (Indictment 71-59- Appendix 3 thru 5 - Indictment 71-148 - Appendix 23 thru 25)

The original complaint filed in the

instant matter on January 26, 1971, stated as follows:

> "That on or about January 26, 1971, at Kenner, Louisiana, and Jefferson Parish, La., in the Eastern District of Louisiana (1) Henry Ernst did knowingly, willfully and unlawfully and with intent to defraud, have in his possession certain counterfeit obligations of the United States, to-wit: Approximately $100,000.00 in $20 Federal Reserve Notes, purportedly drawn on the Federal Reserve Bank of San Francisco, Calif., series 1969, check Letter "H" face place "10" and back plate "46", bearing serial number L. 12759113 A and others; and further did transfer said counterfeit obligations of the United States with the intent that the same be passes, published or used as true and genuine, to one Raymond A. Shaddick all with intent to defraud the United States Government.
>
> And the complainant states that this complaint is based on personal observation by agents of the United States Secret Service that the defendant did have in his possession and did transfer the above described counterfeit obligations to one Raymond A Shaddick and is also based upon information from a confidential informant who has provided reliable information in the past; that Henry Ernst would be in possession of the above described counterfeit obligations at Schwegmann's Food Store, Airline Highway, on January 26, 1971.

That said complaint is not included in the record hereof, but is attached hereto and made a part hereof.

6. WHETHER OR NOT THE TRIAL ERRED IN OVERRULING THE DEFENSE COUNSEL'S OBJECTION TO THE INTRODUCTION OF EVIDENCE OVER THE ARGUMENT BY DEFENSE COUNSEL THAT A PROPER FOUNDATION FOR A CHAIN OF EVIDENCE HAD NOT BEEN ESTABLISHED (Trial T, 202 et seq; Appendix 226-242)

7. WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE QUALIFICATION OF AGENT JOHN J. GIUFFRE, AS AN EXPERT WITH REGARDS TO COUNTERFEIT OBLIGATIONS AND THE TECHNICAL COMPOSITION OF SUCH PAPERS DOCUMENTS (Trial T, 206 thru 216; Appendix 225-242)

Agent John J. Giuffre of the United States Treasury Department was placed upon the stand to introduce into evidence the counterfeit obligations of the subject matter of the criminal proceedings and to testify as to the counterfeit nature of said obligations.

The first objection arose when an effort was made by the U. S. Attorney to introduce said obligations into evidence on the ground that a proper foundation had not been laid with respect to the sequence of events establishing a chain of evidence.

It was readily testified by Agent Giuffre that he had received the obligations from Special Agent Raymond Shaddick and that he had mailed said obligations by registered mail. It was the defendant's contention that since the obligations eventually became into the possession of Agent Howard that a proper chain of evidence should have been established from Agent Clint Howard to whomever he gave it to,

to Agent Giuffre and to the individual to whom Agent Giuffre had delivered the objects and as to all other individuals who had handled the obligations until they were returned to Agent Giuffre.

Since it was established throughout the course of the trial that after Agent Shaddick had received the obligations, he turned them over to Agent Clint Howard. The Chain of evidence then should have been established from Agent Howard to the next individual who came into possession of said obligations and each individual thereafter until they were eventually brought into the courtroom prior to their attempted introduction into evidence.

The chain of evidence in this particular case becomes more significant when it was established that the primary identification mark of said obligations was that of its plate number and serial number and that the same printing press had made counterfeit obligations that were sold and transacted in the State of California and then again in the State of Mississippi and then subsequently to the instant matter in the City of Baton Rouge, Louisiana and at least one or more of the agents involved in the instant matter were involved in all of the other cases wherein the same printing press had printed those counterfeit obligations margin for error or for obligations that were seized in the other arrests were then being only feasible but extremely possible. For this reason, the Court should have required the Government to produce each link in the chain of evidence prior to allowing the introduction of said counterfeit obligations into evidence.

Further, it was revealed during cross-examination that although 7,000 bills were

involved, Agent Giuffre had only initialed 50 or 60 at random.

The next objection that arose while Agent Giuffre was on the stand was to his qualifications as an expert in identifying counterfeit obligations of the United States.

Counsel for the petitioner attempted to traverse the agent's qualifications and objected as his being introduced to the court and accepted as an expert. Said objection was overruled by the court.

The only qualification presented to the Court as to the agent's expertise in identifying counterfeit obligations was his general experience as an agent for the United States Secret Service, routing training that all agents go through and his experience over the years in handling counterfeit obligations.

However, as noted on Appendix 237 through 238, the agent testified as to the composition and make of the paper involved, such testimony concerning pounds per thousands of paper, red and blue fibers, printed marks, fiber marks, etc. This testimony would require the expertise of an individual trained in the composition of paper chemistry and other related matters and up until that time nor subsequent to this testimony did the Government produce any evidence whatsoever as to the agent's qualifications in this particular area of identification of fibers, markings and composition of the paper.

Whether or not the agent was an expert in these matters remains to be seen, however, counsel contends that there was not sufficient testimony or evidence produced into court to allow the court to classify Agent Giuffre as

an expert and to allow him to testify in the manner in which he did. As such the Court was in error, should not have allowed such testimony to go to the jury, the result of which extremely prejudiced the petitioner.

8. WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING A MOTION BY COUNSEL FOR DEFENDANT AT THE CONCLUSION OF THE TRIAL FOR A JUDGMENT OF ACQUITTAL ON THE GROUNDS THAT THE GOVERNMENT FAILED TO PROVE COUNT 1, COUNT 2 AND COUNT 3 OF THE CHARGES AGAINST THE DEFENDANT.

A. Particularly wherein the testimony of the Government witnesses revealed that

1. That the negotiations to sell between the cooperating co-defendant, Tom Dunn Ray, a confidential employee, John Sistrunk and the undercover agent, Clint Howard, did not involve your petitioner, Mr. Ernst, nor was he present;

2. That the testimony of the Government's witness revealed that Mr. Ernst did not own or control the counterfeit obligations, but rather the cooperating co-defendant did;

3. That petitioner was not to sell any counterfeit obligation nor was he to receive any of the proceeds of the sale;

4. That the confidential employee testified that the counterfeit obligations belonged to the cooperating co-defendant;

5. That the United States undercover agent testified at a previous motion hearing that he was making a sale from the confidential employee John Sistrunk, who was his own paid informer;

6. That no testimony or evidence was introduced by the Government to prove beyond a reasonable doubt that the defendant Ernst was in actual physical possession of the counterfeit obligations in the New Orleans area;

7. That the indictment specifically stated that the defendant Henry Ernst sold to United States Agent Clint Howard certain counterfeit obligations, when in fact, at the conclusion of the transaction Agent Clint Howard did not receive counterfeit obligations, but rather another individual who was not named in the indictment;

8. That the undercover agent Clint Howard specifically testified that Henry Ernst did not sell him any counterfeit obligations on the date in question.

The basic charges against the petitioner, Henry Ernst as contended by the Government was that Henry Ernst conspired, possessed and sold counterfeit obligations. However, an examination of the Government's own witnesses clearly reveals that the petitioner did not negotiate with anyone, nor did anyone actually see him in possession of any counterfeit obligations or retrieved from him any counterfeit obligations, nor did he sell any counterfeit obligations to anyone as set forth in the indictment returned against him.

According to the testimony a transaction apart from which the petitioner Ernst is charged which took place in Jackson, Mississippi on January 1 or 2, 1971.

At Appendix 106 the following exchange took place:

MR. MANCUSO:

Q. Now, Sir, you said that you had made the deal with Mr. Howard and Mr. Sistrunk when you were there, when you were in Miss.?

A. That's right.

Q. Was Mr. Ernst present when you made the deal with them?

A. No, he was not.

Other testimony of the trial from all Government witnesses reveals that the negotiations took place between Mr. Sistrunk,Mr. Ray and Agent Howard and Mr. Ernst was not involved in any of the negotiations nor did he own any of the money, nor was he to share in any of the proceeds, but his only connection with the matter, as related by the testimony of Mr. Ray only, was that he was to deliver the money to Jackson, Mississippi, for a specified fee at the request of Mr. Ray.

Further, at Appendix 107 through 109, the following took place:

MR. MANCUSO:

Q. In other words, you had agreed with Mr. Sistrunk and Mr. Howard to sell them $100,000.00 of counterfeit money.

A. Yes, sir.

Q. And Mr. Ernst was supposed to be a part of this transaction?

A. He was going to transfer the money.

Q. Why wasn't he included in the negotiations?

A. Well, that just wasn't the deal.

Q. That was not the deal?

A. No, sir.

Q. If I understand this correctly, you had made a deal with the printer or the manufacturer to sell it and then you contacted Mr. Sistrunk and Mr. Howard as buyers. What I don't understand is what was the necessity, assuming your story is correct, of coming all the way down to New Orleans and getting Mr. Ernst?

A. Well, I had, on January 1, less than a month prior, he had gone all the way from New Orleans and transferred the money from New Orleans to Jackson, Mississippi for me and everything was satisfaction for me there so I called him and we arranged a second transfer again.

Q. My point is he came to Jackson, Mississippi, assuming that your story is correct.

A. It is correct.

MR. DUNN:

I wish he would stop making the point and simply ask his question. He is not here to make points, but to elicit testimony.

THE COURT:

Go ahead Mr. Mancusco.

MR. MANCUSO:

Q. When Mr. Ernst came to Jackson, Mississippi, assuming your story is correct, was this because you had called him?

A. That's correct.

Q. And, assuming that your story is correct, was this because you had called him?

A. That's right.

Q. And assuming that your story is correct when Mr. Ernst went to Baton Rouge, was that because you had sent him there?

A. I didn't sent him anywhere.

Q. Did you tell him to go there?

A. I asked him, or we discussed the fact, and he agreed, we agreed that he would come to Baton Rouge for the sum of $700.00 and pick up and bring back to New Orleans the one hundred something thousand dollars.

Q. Did Mr. Ernst have any deal with Stieglitz?

A. Not that I know of.

Q. Did Mr. Ernst have any deal with Mr. Sistrunk?

A. Yes, I think John gave him $500.00 for bringing it to Jackson, Mississippi.

Q. Did he have any deal with Mr. Howard?

A. Not that I know of.

Q. Did he have any deal with Mr. Stead?

A. Not that I know of.

Q. So, the only deal that we can establish is what you have testified here today?

A. I'm just telling you the truth, just like it is. You can call it a deal if you want to.

Q. Did Mr. Ernst manufacture the money?

A. No, sir.

Q. Did Mr. Ernst solicit you or give you any money to sell?

A. No sir, because I gave it to him.

Q. You gave it to him, assuming that your story is correct?

A. That's right.

Further, at Appendix 110 through 111, this exchange took place:

Q. Now, the day in question, when you met Mr. Sistrunk and the Federal Agent at the Fountainbleu Hotel, was Mr. Ernst with you at that time.

A. No, he was not.

Q. These negotiations concerned you, Mr. Sistrunk, who I am assuming was working with the federal government, and the U.S. agent, Mr. Ernst was not involved in that transaction?

A. No, he was not present, no sir.

Q. Were you present at Schwegmann's Supermarket?

A. I was present in the car when Henry and John Sistrunk and I drove around and this is the spot that Henry suggested to make the transfer, being Schwegmann's Supermarket, I was present, yes.

Q. Were you present when the money allegedly was taken from Mr. Ernst's truck?

A. I was not present in that particular locale that the truck was, but I was not far from there, no, sir.

Q. Did you see the money being removed from the truck?

A. No, I did not.

Q. Did you see Mr. Ernst drive up in the truck?

A. No, sir I didn't.

Q. Was Mr. Ernst supposed to receive any of this money? In other words, the $10,000.00 that you were going to receive for selling the money to the federal agent, was he supposed to receive any of that?

A. That had nothing to do with the $700.00, his fee, no sir. He was not to receive any of that.

Q. Mr. Ernst was going to sell the federal agent and another employee over $100,000.00 worth of counterfeit money

and he was not going to receive any real money in return?

A. Mr. Ernst was not selling. I was the one doing the selling. He was merely transferring the money for me.

As it can be readily seen if we are to believe Mr. Ray's testimony, Mr. Ernst's part in the entire transaction was at the request of Mr. Ray, he journeyed to Baton Rouge, picked up the counterfeit money that was to be the subject of the sale without the knowledge of who was involved in the sale and delivered it to a specified location, predecided by the confidential informant, John Sistrunk and the cooperating co-defendant, Mr. Ray, deposited there for a U.S. Agent to pick it up.

Although this is the testimony of Mr. Ray, at no time was Mr. Ernst engaged in any negotiations, at no time did anyone actually see Mr. Ernst in possession of said counterfeit obligations, Mr. Ernst did not own any of the counterfeit obligations, nor did Mr. Ernst sell any counterfeit obligations.

During the course of Mr. John Sistrunk's testimony, he testified that he was a 15 year friend of Tom Dunn Ray, and that he engaged in counterfeit transactions in Mr. Ray's behalf in the State of California, that he was involved in four counterfeit transactions in the State of California that resulted in his being charged on four counts, three of which were dismissed, the other he pled guilty to and received a probationary sentence after he had participated in the arrest of the petitioner, Ernst. He further testified that he traveled to Mississippi and Louisiana with Agent Clint Howard and that while so traveling,

the Government paid his expenses.

Appendix 200 through 203, the following exchange took place between counsel for petitioner and Mr. John Sistrunk:

Q. Now, you were called in California by Mr. Ray?

A. Yes.

Q. Did Mr. Ernst call you in California?

A. No, he never did.

Q. And these negotiations took place in California,at that time, was Mr. Ernst in California?

A. Not to my knowledge.

Q. Did Mr. Ray summon you from California to Jackson, Miss.?

A. Right.

Q. Did he bring along Mr. Howard?

A. And Mr. Shaddick.

Q. Two, in other words, federal agents?

A. Right.

Q. How did you all get from California to Louisiana?

A. We flew down.

Q. And the Government picked up the tab?

A. Yes.

Q. And you flew to Jackson, Mississippi?

A. Yes.

Q. And, it was there that you and Mr. Ray and Mr. Howard met?

A. Right.

Q. And, you began to negotiate for a sale?

A. Yes.

Q. And, did a sale take place at that time?

A. Yes.

A. Mr. Howard brought some counterfeit from Mr. Ray.

Q. So, the negotiations that you, Mr. Ray and Mr. Howard had at that time resulted in a sale of counterfeit obligations to Agent Howard?

A. Right.

Q. Now, was Mr. Ernst involved in those negotiations with you and Mr. Ray and Mr. Howard which resulted in a sale to Mr. Howard?

A. No, all he did was to deliver the hundreds for the twenties when we made the exchange.

Q. Assuming your testimony is correct, Mr. Ernst did not engage in the negotiations with you or with the Federal Government or with Mr. Ray, but all he did was simply to deliver a package. Is that correct?

A. Right.

Q. And he was paid for that?

A. Right.

Q. The money received by him was not for a sale?

A. I don't understand.

Q. In other words, he didn't sell you the counterfeit money?

A. No sir, I understood that it was on consignment from New Orleans.

Q. Assuming your testimony is correct, Mr. Ernst did, in fact, go to Jackson, Mississippi, to deliver a package?

A. Right.

Q. Now, while there, did Mr. Ernst engaged in any negotiations with Mr. Howard to sell him further counterfeit money in New Orleans area?

A. Not to my knowledge.

Q. Did you and Mr. Ray engaged in any such negotiations with Mr. Howard to sell him money in the New Orleans area?

A. Yes.

Q. So, the conspiracy, so to speak, that took place in Jackson, Mississippi, took place between you and Mr. Ray and Mr. Howard?

A. Right, yes and Stead.

Q. Did you say Shaddick?

A. Charlie Stead.

Q. Was a sale made with Mr. Stead?

A. He was the man who had possession of the twenty dollar notes.

Q. So, these negotiations which you might call a conspiracy resulting in the same in New Orleans took place in Jackson Miss and they did not involve Mr. Ernst?

A. Not in the sale, no sir.

Further, at Appendix 215, this exchange took place between counsel for petitioner and the confidential informant, Mr. John Sistrunk:

Q. Mr. Sistrunk --

A. Yes, sir.

Q. Was it your impression that Mr. Ray was the source of supply for the printer, whomever that printer might have been?

A. Yes, sir.

Q. And I think you testified on direct examination that there was never any doubt in your mind that the counterfeit money to be sold during this transaction belonged to Mr. Ray?

A. Right.

During the course of the trial, Agent Clint Howard testified as follows, at Appendix 151:

Q. Now Agent Howard, when you met with Mr. Ray and Mr. Sistrunk in Jackson, Mississippi, you say there were some negotiations that took place?

A. That's right.

Q. Was Mr. Ernst involved in those negotiations?

A. No sir, not to my knowledge.

Q. Was he, in other words, present --

A. No sir.

Q. When you and Mr. Ray and Mr. Sistrunk negotiated whatever further transactions there might have been?

A. He was not, no sir.

Further testimony along these same lines may be found at Appendix 160 through 161, as follows:

Q. Now, when you met that morning as a result of Mr. Ray's appointment at the Fountainbleu Motel, was Mr. Henry Ernst present?

A. No, he was not.

Q. Mr. Ernst, did he take part in any of the negotiations between you and Sistrunk and Ray concerning the counterfeit transactions that were to take place later on that day?

A. At that time, no sir.

Q. At that time?

A. No sir.

Q. Now, sir, you were later informed that this transaction was to take place at Schwegmann's Supermarket on the Airline Hwy?

A. Right.

Q. And you were later informed in fact, as to the type of vehicle that was to be parked at the particular spot in the parking lot?

A. That's correct.

Q. Who informed you of this?

A. Mr. Sistrunk.

Q. Mr. Sistrunk informed you?

A. Correct.

Q. Did Mr. Ernst inform you.

A. No sir.

Q. So, as of now, you still have had no negotiations whatsoever with Mr. Ernst?

A. No sir.

Q. All of your negotiations from the very beginning of this occurrence that occurred in Jackson, Miss. until that day had been with Mr. Sistrunk who was operating for the Federal Government, and Mr. Ray?

A. That's correct.

Q. All of these discussions and negotiations took place between three of you?

A. Yes, sir.

The indictment under which the petitioner was put to trial (Appendix 23-25) contained the following language:

> "That on or about January 26, 1971, in the New Orleans Division of the Eastern District of Louisiana, Henry Ernst and Tom Dunn Ray, did sell, transfer and deliver to Clint L. Howard, 7,350 counterfeit obligations of the United States, to wit ..."

Concerning the above allegations and said indictment the following exchange took place between counsel for the petitioner and a witness, Agent Clint Howard at Appendix 169 through 171:

Q. Did you see Mr. Shaddick receive the money from Mr. Ernst?

A. No sir.

Q. Did you see Agent Shaddick give Mr. Ernst any real money?

A. No sir, I didn't.

Q. Agent Howard, in Count 3 of this indictment, and I will quote, it says, "That on or about January 26, 1971, in the New Orleans Division of the Eastern District of Louisiana, Henry Ernst and Tom Dunn Ray did sell, transfer and deliver to Clint L. Howard, 7,350 counterfeit obligations of the United States, to-

wit:" and it goes on and describes the serial number and so forth and so on.

Q. Do I take it correct from your testimony, sir that you did not receive any counterfeit obligations from Mr. Henry Ernst?

A. I actually received the notes from Agent Shaddick.

Q. But, you did not receive them from Mr. Henry Ernst?

A. No sir.

Q. Henry Ernst did not sell you any counterfeit obligations?

A. No in a hand to hand thing.

Q. Not in any fashion, I suggest, sir, you didn't ever negotiate with Mr. Henry Ernst, did you?

A. No sir.

Q. Did you give Mr. Ernst any good money?

A. No sir.

Q. Did Mr. Ernst give you any funny money or counterfeit money?

A. No sir.

Q. Did you retrieve any money from Mr. Ernst's vehicle?

A. No sir.

Q. Did you have any negotiations with Mr. Ernst?

A. No sir.

Q. Well then, when this indictment says that Henry Ernst did sell, deliver and transfer to Clint L. Howard, 7,350 counterfeit obligations of the United States, then that is incorrect, isn't it?

MR. SMITH:

He is asking this witness a legal conclusion.

MR. MANCUSO:

Let me ask you this, Sir, that statement that I must read to you, is that correct?

THE COURT:

That's the same question, Mr. Mancuso.

MR. MANCUSO:

Did Henry Ernst sell you any counterfeit obligations on January 26, 1971?

A. No sir.

MR. MANCUSO:

I have no further questions.

To reiterate and emphasize the point once again, the only evidence produced at the trial of the instant matter, connecting the petitioner with the negotiations and sale that took place in New Orleans on January 26, 1971, was the testimony of his co-defendant, Tom Dunn Ray, who was charged with

numerous violations and eventually received a suspended sentence, was that at his instructions Mr. Ernst went to Baton Rouge, retrieved a package from the printer's automobile and returned it to New Orleans and kept it for Mr. Ray because Mr. Ray was afraid of being caught. Nowhere in the course of the trial did the Government produce any evidence whatsoever to show that Mr. Ernst was ever in physical possession of the counterfeit obligations. As a matter of fact, the only connection as far as the Government agents were involved that Mr. Ernst had with the matter was reported to them by Mr. Ray and his friend Mr. John Sistrunk. The fact remains, however, that at no time did any lawenforcement agent apprehend or discover Mr. Ernst in physical possession or within 50 yards of any counterfeit obligations.

The testimony of Agent Clint Howard, Agent Raymond Shaddick, the confidential informer, John Sistrunk and the cooperating codefendant, Mr. Tom Dunn Ray, postively showed that Mr. Ernst did not engage in any negotiations with anyone, nor did he own any counterfeit money, nor was he to receive any of the proceeds of the sale of the counterfeit money, nor was he involved in any manner other than depositing the money, if we are to believe Mr. Ray's testimony, at a certain location for a flat fee.

In no manner of law, Mr. Ernst's participation, if there is sufficient evidence at all, to establish that participation amounted to a conspiracy, possession or sale.

It could well be argued that no substantial evidence in any way of registration papers, license numbers or otherwise were presented at the trial of the instant case to

establish the ownership of the vehicle wherein the counterfeit obligations were seized by Agent Shaddick.

The trial court having the technical knowledge of what constitutes conspiracy, possession and sale, and hearing all of the said testimony should have concluded that the Government has not proven its case as set forth in its indictment against Mr. Ernst and should not have allowed the matter to go to the jury where the possibility existed that they could have confused the issues and not been able to distinguish the technical nicities of a conspiracy or what constituted possession and/or sale.

The outright statement by Clint Howard that he, in fact, did not purchase any counterfeit obligations from the defendant. Ernst should have been sufficient in itself to negate that portion of the Indictment.

Therefore, the aforementioned considered along with the testimony of all the witnesses and their candid admittance of Mr. Ernst's non-involvement in the negotiations and sale should have resulted in a Judgment of Acquittal by the trial court and its failure to do so is respectfully submitted as error.

Rule 29 of the Federal Rules of Criminal Procedure states in part:

> "...the court on motion of a defendant or of its own motion shall order the entry of Judgment of Acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses..."

In the instant matter since no testimony or concrete evidence was presented to indicate that Mr. Ernst possessed counterfeit obligations, conspired through negotiations to possess or sell counterfeit obligations, the evidence at its very best was circumstantial and as such, an acquittal should have been ordered unless the circumstantial evidence excluded every hypothesis except that of guilt. Cuthbert v. U.S. CA 5th (1960) 278 F. 2d 220, 224-225; Riggs v. U.S. CA 5th (1960) 280 F. 2d 949, 955; Hamilton v. U.S. CA 5th (1962) 304 F2d 542, 545; Newsome v. U.S. CA 5th (1962), 311 F. 2d 74, 78. Cohand v. U.S. CA 5th (1966), 363 F2d 321, 327, certiorari denied; 87 S. Ct. 395, 385 U.S. 957.

> In criminal cases based substantially upon circumstantial evidence, court must assiduously adhere to requirement that circumstantial evidence be sufficiently convincing to prove guilt and that surrounding circumstances must have such force and bearing as to justify jury in finding that they were not only consistent with defendant's guilt, but inconsistent with his innocence.

Barnes v. U.S. CA 5th (1965), 341 F 2d 189, 192. Also see, Montoya v. U.S. CA 5th, (1968), 40 F. 2d 847, 850; McMillian v. U.S. CA 5th (1968) 399 F2d 478 479.

Unless evidence viewed in light most favorable to verdict is such as to reasonably permit finding beyond reasonable doubt of every essential element of offense, defendant's motion for acquittal after jury verdict must be sustained. U.S. v. Wayne, D.C. Mo. (1969) 302 F. Supp. 1247.

9. WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S MOTION AT THE CONCLUSION OF THE TRIAL FOR A JUDGMENT OF ACQUITTAL ON THE GROUNDS THAT THE INDICTMENT UPON WHICH THE DEFENDANT WAS PUT TO TRIAL WAS DEFECTIVE AND WAS NOT THE INDICTMENT UPON WHICH THE DEFENDANT HAD BEEN ARRAIGNED (Trial T. 227, et seq.)

Petitioner Henry Ernst was served with an indictment in the criminal matter No. 71-59 and received notice of arraignment on said indictment for March 17, 1971, in the United States District Court for the Eastern District of Louisiana, New Orleans Division, Section E, the Honorable Fred J. Cassibry presiding (Appendix 3)

On said date the defendant so appeared and was arraigned by the United States Attorney Michael Ellis and entered a plea of not guilty. Although the reading of the indictment was waived, the U.S. Attorney informed Tom Dunn Ray and Henry Ernst at that time as follows:

> "Tom Dunn Ray and Henry Ernst, you are charged with possession of and dealing with counterfeit obligations of the United States, all in violation of Title 18, U.S.C. 472, 473. This is a three count indictment. You are both charged in counts one and three. Mr. Ernst you are charged in count 2. Count one carries with it a possible maximum period of imprisonment of up to five years and a possible maximum fine of up to $10,000.00 or both. Mr. Ernst, you are charged in count two and you fact there a possible maximum period of

imprisonment up to 10 years or a possible maximum fine of up to $5,000.00 or both. Do you each understand that?"

A. Yes (by both defendants)

It is well to note that the original indictment under criminal action No. 71-59, the language, in violation of the U.S.C. Section 371 with reference to the conspiracy statute is omitted. Also, in Mr. Ellis' reading of the charge or explanation of the charge to the defendant at that time, it is also omitted that defendants were in violation of Title 18 U.S.C. 371, which is the conspiracy statute.

It is the Government's contention that subsequent to the return of a true bill against the defendant in criminal action No. 71-59, that another indictment on March 9, 1971, was returned under criminal action No. 71-148, which is supported by the record (Appendix 23)

It is the Government's contention that the indictment in criminal action No. 71-148 superceded that of criminal action No. 71-59 and was the indictment on which the petitioner was put to trial.

It is petitioner's contention that the only indictment that he or his counsel ever received was the one in criminal action No. 71-59 and it is well to note that the indictment in criminal action No. 71-148 contains the language that the defendants were in violation of Title 18 U.S.C. 371, et seq. however at the time of the arraignment in his explanation as to the nature of the charge, the U.S. Attorney, Mr. Michael Ellis, did not mention section 371 or Title 18, nor did the

indictment in criminal action No. 71-59.

It is therefore contended that the defendants were arraigned on the criminal action set forth in No. 71-59 and were never arraigned on the indictment set forth in criminal action no. 71-148. The indictment which eventually the petitioner, Henry Ernst, was put to trial upon.

When this was discovered during the course of the trial, counsel for petitioner objected and asked for a judgment of acquittal based upon improper indictment, defective indictment, in that the petitioner was put to trial on an indictment upon which he had never been arraigned. (Appendix 246 et seq)

Rule 10 of the Federal Rules of Criminal Procedure states as follows:

> "Arraignment shall be conducted in an open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plea."
>
> Under Federal Law, arraignment is necessary to trial, and its preliminary stage where accused is informed of indictment and pleads to it, thereby formulating issue to be tried.

Hamilton v. State of Ala (1961) 82 S.Ct. 157, 368 U.S. 52

> Further, under Federal law, arraignment is a sine qua non to trial itself. The preliminary stage where accused is informed of indictment and pleas to it, thereby formulating issue to be tried.

Anderson v. U.S. (1965) 352 F 2d 945, 122 U.S. App. D.C. 277

> Subject to some exceptions, an arraignment and a plea, especially the plea, are essential to a valid conviction. Further, the court is without jurisdiction to enter judgment of conviction where record shows no plea.

People v. Bain, 193 N.E. 137; 358 Ill. 177
People v. Snively, 138 N.E. 2d 112, 11 Ill App 2d 579

> In a capital or other infamous crimes, an arraignment is regarded as a necessary part of the proceedings and not a matter of form only, but of substance involving substantial right of accused.

Basta v. State, 105 A 773, 133 Md 568

Citations herein are merely representative of what the general law is throughout the various jurisdictions of the United States and the Federal Judicial System.

The matter of Strong v. State, 252 So. 2d 659, the Court found that a murder conviction could not be sustained where the record did not disclose arraignment. It is submitted that the conviction in this matter should not be sustained for the record upon which the

defendant was tried does not disclose an arraignment.

In the matter of State v. Chadwick, 47 Pac. 2d 323, 234, 150 Or 645, the Court stated.

> "A criminal case may not be tried until it is at issue, it is put at issue on a question of fact by a plea of not guilty or a former conviction."

10. WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR A SPECIAL JURY INSTRUCTION NO. 1 on ENTRAPMENT AND WHETHER OR NOT THE COURT ERRED IN NOT GIVING ANY INSTRUCTION ON THE LAW OF ENTRAPMENT WHATSOEVER, OR WHETHER OR NOT THE COURT ERRED IN NOT SUBMITTING TO THE JURY DEFENSE'S REQUEST FOR JURY INSTRUCTION NO. 2 ON INFORMER, OR WHETHER OR NOT THE COURT ERRED IN NOT SUBMITTING TO THE JURY DEFENSE'S REQUEST FOR JURY INSTRUCTION NO. 3 ON ACCOMPLICES.

SUCH CONTENTIONS OF ERROR BEING BASED ON THE FOLLOWING FACTS:

1. The transaction to sell counterfeit obligations of the United States was initiated by a cooperating co-defendant and a confidential employee of the Government, who has pending charges dropped and received a suspended sentence on a remaining charge, after the defendant's arrest;

2. That defendant's co-defendant who turned out to be a cooperating co-defendant and the confidential employee who was a paid employee of the undercover agent, had criminal charges of counterfeiting against him pending, were close personal friends for many years.

3. That the confidential employee and the federal undercover agent traveled from the State of California to the States of Mississippi and Louisiana at the expense of the United States Government to engage in a transaction with the cooperating co-defendant Tom Dunn Ray, wherein in the undercover agent did purchase and make arrangements to purchase from his own confidential employee and paid informer counterfeit obligations of the United States to be supplied by the cooperating co-defendant.

4. That notwithstanding co-defendant was a supplier for the main printing source, had admitted to numerous counterfeiting violations, he assisted the Government in arrests of several individuals subsequent to his "alleged" arrest with your petitioner, testified against your petitioner and received a suspended sentence.

5. That the cooperating co-defendant, Tom Dunn Ray, solicited and directed your petitioner into delivering the obligations to a certain spot pre-arranged by the confidential employee and the cooperating co-defendant in the presence of your petitioner.

6. Your petitioner was not involved in any negotiations, but rather the undercover agent, Clint Howard, the confidential employee, John Sistrunk, who had pending charges against him which were eventually dropped, and the cooperating co-defendant, Tom Dunn Ray, testified at defendant's trial and received a suspended sentence, made all arrangements for a sale to be consummated between the cooperating co-defendant, the confidential employee and the undercover agent, wherein the undercover agent was to purchase from his own confidential employee counterfeit obligations

of the United States, supplied by the cooperating co-defendant.

7. Reviewing all of the facts and circumstances of the case and considering that the defendant, Ernst was the only individual who received a penitentiary offense, notwithstanding the fact that his allege role in the transaction was the most minute and minor one, would lead to the reasonable assumption that the possibility existed that he was entrapped into the transaction by his co-defendant, the confidential employee and the undercover agent, and that the cooperating co-defendant was working in behalf of the Government prior to the arrest of the defendant, Ernst. Sufficient facts therefore existed to warrant the trial court on instructions to the jury on the matters contained in Issue No. 10.

Such information was sought to be discovered by your petitioner in a Bill of Particulars which is the subject of the contention of error in Issue No. 3.

Prior to the conclusion of the trial on the merits of the instant case, counsel for petitioner submitted numerous requested jury instructions to the District Court. The Court refused to give said instructions and in particular refused to give an instruction concerning entrapment.

When considering the following facts, the petitioner respectfully submits that the trial court erred in not submitting to the jury an instruction concerning the law of entrapment.

During the course of the trial, it was revealed through Government witnesses testimony that John Sistrunk was cooperating with the United States Government during a

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counterfeit obligation investigation taking place in the State of Louisiana, That he had previously been arrested on numerous charges in the State of California by Federal authorities and that of the four charges he had pending, three were dismissed and a plea of guilty was entered on the fourth. That while he was conducting his investigation in the State of Louisiana in concert with two agents of the United States Government, a determination of his sentence was pending.

After the arrest of the petitioner, Henry Ernst, he received a suspended sentence.

That the individual whom he was negotiating the sale of the counterfeit obligations was a 15 year friend, Tom Dunn Ray, who had engaged in the counterfeit obligations transactions in the State of California which resulted in the four charges against John Sistrunk. That John Sistrunk and agents of the United States Treasury Department traveled from the State of California to the State of Louisiana to meet Tom Dunn Ray. They entered into negotiations there that did not concern the petitioner, Ernst in any manner, however, Tom Dunn Ray, called Mr. Ernst and had him travel to Jackson, Miss., according to Mr. Ray's testimony and deliver counterfeit obligations to Mr. Sistrunk that Mr. Ray had previously deposited with the petitioner Henry Ernst.

That while in Mississippi, the federal agent, the federal paid informer and Mr. Ray, who later turned out to be a cooperating individual, negotiated to continue said counterfeit obligations transactions in the State of La.

Mr. Ray later on in the month of January, 1971, contacted the agent and Mr. Sistrunk in California and had them meet him in the State of Louisiana.

Mr. Ray once again solicited Mr. Ernst to travel to the City of Baton Rouge, Louisiana, and pick up from an automobile owned by the printer of the counterfeit obligations a package, bring it back to New Orleans, and hold on to it until Mr. Ray told him what to do with it.

Once again the negotiations were conducted between Mr. Ray, Mr. Sistrunk and Mr. Howard. Mr. Ernst was not included in said negotiations, and the only manner in which Mr. Howard became familiar with Mr. Ernst was through the word of Mr. Ray.

It was also revealed during the course of the trial that Mr. Ernst did not own the counterfeit money, was not in control of the counterfeit money, was not part of the sale of the counterfeit money, nor was he to participate in the proceeds of the sale of the counterfeit money.

During the course of a hearing for a Motion to Suppress the Evidence, the following exchange took place between counsel for petitioner Ernst and Agent Clint Howard:

Q. You said that the negotiations had been made with Tom Dunn Ray and John Sistrunk. Were you a part of the negotiations between Ray and Sistrunk?

A. I was attempting to buy the counterfeit obligations from them, yes.

Q. From Mr. Ray or from Mr. Sistrunk?

A. Mr. Sistrunk.

As can be seen from this exchange on examination during a motion to suppress which is recorded at Appendix 51, Agent Clint Howard testified that he was attempting to purchase counterfeit obligations from John Sistrunk, who was in fact, his paid informer.

It is further revealed during the course of the trial that although Mr. Ray had been a co-defendant of Mr. Ernst, his bond was eventually reduced to $5,000.00. He made a statement wherein he involved himself in numerous transactions of counterfeit obligations in the past of which he was not charged by the United States Government and subsequently after putting up a $5,000.00 as compared to Mr. Ernst's $50,000.00 bond, he journeyed to the City of Baton Rouge and cooperated with the United States Government in making numerous arrests in that City. It is well to note that after Mr. Ernst was convicted and received six years, Mr. Ray received a suspended sentence.

After considering the close relationship between Mr. Ray and Mr. Sistrunk and the fact that the agent Howard was attempting to buy from Mr. Sistrunk his confidential and paid informer, who had pending charges against him and who had received a suspended sentence after the arrest of Mr. Ernst and that Mr. Ray denied having been cooperating with the Government during the arrest of Mr. Ernst, did in fact, admit quite candidly of his cooperation after the arrest of Mr. Ernst. Further considering that Mr. Ernst's involvement in this matter was simply that of a delivery boy who became involved at the sole request of Mr. Ray

and had it not been for Mr. Ray soliciting Mr. Ernst's involvement for delivering packages back and forth, he would not have been involved at all. And further considering that Mr. Ernst's part in the transaction, if any at all, was extremely minor and unnecessary and was not essential to the transaction, for Mr. Ray could have picked up the packages himself. And further considering the long and close relationship between Mr. Sistrunk and Mr. Ray, it would be reasonable to conclude of a reasonable man that Mr. Ray and Mr. Sistrunk were cooperating with the United States Government in an effort to obtain some type of an arrest against Mr. Ernst.

Whether or not this was the case, there was certainly substantial evidence present to warrant a charge of entrapment to the jury so that they could have made that decision based upon the law as presented to them by the court and the evidence presented to them through cross-examination of the witnesses.

The defense of entrapment is raised by a plea of not guilty. Sorelles v. U.S., (1932) 287 U.S. 435.

A defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be. U.S. v. O'Conner (1956) CA 2nd 237 F. 2d 466, 474.

Considering the aforementioned facts and authorities, it is respectfully submitted that the trial court erred in denying to present to the jury an instruction on the law of entrapment.

11. WHETHER OR NOT THE TRIAL COURT ERRED BY NOT INCLUDING IN ITS GENERAL CHARGE TO THE JURY LANGUAGE IN BEHALF OF THE DEFENSE CONCERNING CIRCUMSTANTIAL EVIDENCE TO THE EFFECT THAT THE JURY SHOULD ADOPT AN REASONABLE HYPOTHESIS OF INNOCENCE WHEN DEALING WITH CIRCUMSTANTIAL EVIDENCE: THAT THE GENERAL CHARGE WITH REFERENCE TO CONSPIRACY WAS NOT SUFFICIENT FOR JURY CONSIDERATION IN BEHALF OF THE DEFENDANT AND THAT OMITTED FROM SUCH CHARGES WERE MATTERS THAT NEGATED CONSPIRACY, SUCH AS INNOCENT MEETINGS OF PARTIES INVOLVED IN SOME OTHER SCHEME AND OTHER MATTERS, OR EXAMPLES THAT A JURY COULD RELATE TO SPECIFIC INCIDENTS NOT BEING A CONSPIRACY.

THE OMISSION IN THE GENERAL CHARGE OF THE COURT WITH REFERENCE TO POSSESSION, THAT NAKED POSSESSION IS NOT SUFFICIENT IN ITSELF, THAT THERE MUST BE KNOWLEDGE AND INTENT BY THE INDIVIDUAL CHARGED WITH SAID POSSESSION:

THAT SAID CHARGE WITH REFERENCE TO POSSESSION DID NOT CONTAIN ANYTHING THAT WOULD ALLOW A JURY TO FIND TO THE CONTRARY, BUT RATHER THE COMPLETE CHARGE WAS PRO-POSSESSION:

THAT THERE WAS NOT SUFFICIENT LANGUAGE IN THE CHARGE WITH REFERENCE TO SELLING, TRANSFERRING, DELIVERING, COUNTERFEIT OBLIGATIONS, THAT WOULD INDICATE TO THE JURY THAT THE ESSENTIAL ELEMENT OF THE CRIME IS KNOWING THE OBJECT TO BE DELIVERED TO BE COUNTERFEIT WITH SPECIFIC INTENT TO DEFRAUD.

THAT THE GENERAL CHARGE WITH REFERENCE TO AIDING AND ABETTING WAS INSUFFICIENT AND WAS PRO-PROSECUTION AND CONTAINED NOTHING THAT THE JURY COULD CONSIDER IN BEHALF OF THE DEFENDANT.

The general charge to the jury may be found at Appendix 290, et seq.

At the proper time, counsel for petitioner made the following objection to the court with regards to his denial of the special jury instructions submitted by counsel and the general charge that the court eventually gave.

THE COURT:

All of these things we discussed at conference prior to the charges being given, and I have denied all of these motions.

MR. MANCUSO:

Your honor, I feel that my charge on entrapment that I have requested is proper and also my charge as to an informer which I have requested the court to give.

Also, the defense charge on accomplice, which I requested the court to give.

Further, I wish to have included in this, in the jury charges as discussed prior to the submission of the charge to the jury that part dealing with circumstantial evidence in the charge that the court include there the language concerning the fact that circumstantial evidence, if there is any reasonable hypothesis of innocence to be derived from such circumstantial evidence, that the hypothesis must be assumed by the jury and decided in favor of the defendant. The Court has denied that charge too.

Further, with regard to the jury charge,

that the Court charge the jury with regard to what an accomplice is. I submit that my charge which was suggested to the Court and which was denied is proper.

Also, with regard to the charge delivered to the Court regarding an informer, I requested that the Court include the language, "whose self-interest or attitude is shown to be such as might tend to promote testimony unfavorable to the accused must be weighted and examined by the jury with greater care than the testimony of any ordinary witness". That charge was denied by the court.

I object also, of course, to the charge concerning Count 1 of the indictment which refers to violation of Title 18, Section 371 on the grounds that that was not the section of Title 18 under which the defendant was originally arraigned, nor was a copy of the indictment delivered to the defendant. We submit that the indictment should be dismissed with the judgment of acquittal, there should be no verdict rendered by this jury on that count.

Further, the jury is concerned with the conspiracy, and there was no mention in the charge as to what acts on behalf of the defendant did not constitute a conspiracy such as an innocent meeting with parties involved in some other scheme. There is nothing in the charge to the jury as to what does not constitute a conspiracy. Further, the charge as to possession, I indicated to the Court that the act of possessing the notes on the part of the defendant which was an essential element should have been

included in there. Knowing them to be counterfeit, that knowledge and intent is an essential element of the crime and was not included in the charge which was referred to the jury. Further, I requested the Court in dealing with possession that the Court instruct the jury that the mere naked possession of a matter is not sufficient in itself, that in addition to the naked possession that there must be knowledge and intent and I requested the Court to include that language in the charge and that was denied. And, in connection with that same thing, I object to the charge on possession in that it did not contain anything which would allow the jury to find to the contrary, that the complete charge was pro possession and had nothing contained in the charge for the jury to concern themselves or to consider as to the contrary.

Further, in the charge to the jury concerning evidence with respect to Count 111, selling, transferring and delivering, I say that there is an essential element of the crime and the language, knowing them to be counterfeit, with specific intent to defraud, is missing.

Now, the charge to the jury concerning principal and aiding and abetting, I object to that particular charge because there should have been included in there aiding and abetting, aider and abetter should have knowledge that this act was toward the commission of a particular crime, but here is nothing in the charge to the contrary, as to aiding and abetting, that the jury could find. It was all pro and nothing in the charge that the jury could consider in behalf of the

defendant.

Further on page 22 of the charge, circumstantial evidence was mentioned once again. I would have wanted inserted in that charge in dealing with circumstantial evidence a reasonable hypothesis of innocence should be inferred from any circumstantial evidence tending toward the defendant's acquittal in the matter. In other words in dealing with circumstantial evidence the Court omitted from the charge the theory of a reasonable hypothesis of innocence that should be inferred if there is such a reasonable hypothesis.

In addition to those charges, I now enter an objection to the complete charge which has been read to the jury.

THE COURT:

All right.

Now you have mentioned some of your charges, your proposed charges. So that the court upstairs will know what we are talking about, you should put those in evidence and I will permit you to do so. Make sure that the Clerk gets them.

MR.MANCUSO:

I thought I had filed them. They were filed, but I will file them again.

THE COURT:

Just pick out the special one that you are objecting to because there is not use in putting all of these just those that you mentioned.

MR. MANCUSO:

The charges that I submitted to you, the one on entrapment, that charge was completely omitted. Then I have the charge on informer which was not adopted in its entirety by the Court, and I had a charge which I submitted on accomplice, which was not adopted in its entirety by the Court, which I would have wanted in and my objection is that they were not and I file them now with the Clerk. I thought they had been filed.

THE COURT:

Does the United States have anything to say?

12. WHETHER OR NOT THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE INDICTMENT ON WHICH THE TRIAL WAS CONDUCTED, BUT WAS NOT THE INDICTMENT UNDER WHICH THE DEFENDANT WAS ARRAIGNED.

Because the petitioner feels that he was put to trial on an indictment other than the one he was arraigned, he objected to the Court's submitting to the jury for consideration the indictment upon which he was not arraigned, for it was different than the one he had originally been served with and answered to at his arraignment.

13. WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S POST TRIAL MOTIONS OF (1) MOTION TO ARREST JUDGMENT, (2) MOTION TO DISMISS THE INDICTMENT, (3) TO SET ASIDE THE VERDICT OF THE JURY AND ENTER A JUDGMENT OF ACQUITTAL, (4) MOTION FOR A NEW TRIAL, (5) MOTION TO QUASH THE

INDICTMENT, (6) MOTION TO DECLARE THE PROCEEDINGS WHEREIN THE DEFENDANT WAS CONVICTED A MISTRIAL, (7) MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT, AND (8) MOTION FOR A NEW TRIAL.

All of the petitioner's post trial motions as cited above were denied at a hearing after the conviction of the petitioner.

The argument to substantiate petitioner's post trial motions have been covered in argument of all other issues.

Therefore, to reiterate such authorities, evidence and law would be redundant and repetitive.

CONCLUSION

It is respectfully submitted that, for the reasons submitted, the judgment should be reversed.

Respectfully submitted,

WAYNE DOUGLAS MANCUSO
Attorney for Petitioner

STATE OF LOUISIANA

PARISH OF JEFFERSON

I am a citizen of the United States and a resident of the county aforesaid, I am over the age of eighteen years and not a party to the within entitled action, my residence/business address is 300 Huey P. Long Avenue, Gretna, Louisiana 70053.

On _____day of _____, 1972, I served the within Petition for Writ of Certiorari on the respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at New Orleans, Louisiana, addressed as follows:

United States Attorney
500 St. Louis Street
New Orleans, Louisiana

Solicitor General
Department of Justice
Washington, D. C.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on the _____day of October, 1972, at Gretna, Louisiana.

_____

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1413
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HENRY ERNST,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 3, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] [2] *See Lewis v. United States*, 385 U.S. 205, 87 S.Ct. 424 (1966).

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

[2]Appellant asserts as grounds for appeal: (1) the District Court's refusal to suppress evidence obtained in an allegedly illegal search, (2) denial of defendant's Motion for Discovery of a government witness's statement, (3) denial of defendant's Motion for a Bill of Particulars, (4) failure to exclude hearsay testimony, (5) defective proof of chain of custody of evidence, (6) abuse of discretion in permitting a Secret Service Agent to testify as an expert in recognizing counterfeit currency, (7) insufficiency of the evidence, (8) defective indictment, and (9) the District Court's refusal to give certain requested jury instructions, including an instruction on the law of entrapment.

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APPENDIX "B"

STATUTES INVOLVED

Title 18, Section 371 - Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, Section 482 - Counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes or sells or attempts to pass, utter, publish, or sell or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited or altered obligation or other security of the United States shall be fined not more than $5,000.00 or imprisoned not more than fifteen years or both.

Title 18, Section 483 - Dealing in counterfeit obligations or securities

Whoever, buys, sells, exchanges, transfers, receives or delivers any false, forged, counterfeited or altered obligation or other security of the United States, with the intent that the same be passed, published or used as true and genuine, shall be fined not more than $5,000.00 or imprisoned not more than ten years or both.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

INDICTMENT

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 71-59
versus	:	SECTION E
HENRY ERNST and TOM DUNN RAY	:	VIOLATION: Title 18, U.S.C., §472 Title 18, U.S.C., §473
	:	Filed Feb 16, 1971

The Grand Jury charges:

COUNT I

From on or about the 30th day of December, 1970, and continuously thereafter up to and including January 26, 1971, in the Eastern District of Louisiana and elsewhere, HENRY ERNST and TOM DUNN RAY, the defendants, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit an offense against the United States, to wit: to sell, transfer and deliver false, forged and counterfeited obligations of the United States with the intent that the same be possessed, published and used as true and genuine in violation of Title 18 of the United States Code, Section 473.

It was a part of said conspiracy that the defendants would possess and conceal falsely made, forged and counterfeited obligations of the United States with the intent to defraud, well and truly knowing the said notes to be falsely made, forged and counterfeited in violation of Title 18 of the United States Code, Section 472.

It was further a part of said conspiracy that the defendants would sell, transfer and deliver the said falsely made, forged and counterfeited obligations of the United States with the intent that the same be passed, published and used as true and genuine notes in violation of Title 18 of the United States Code, Section 473.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

OVERT ACTS

1. On or about the 2nd day of January, 1971, in Jackson, Mississippi, the defendant TOM DUNN RAY sold to Clint Howard $19,700 worth of counterfeit Twenty ($20.00) Dollar Notes.

2. On or about the 26th day of January, 1971, in the New Orleans Division of the Eastern District of Louisiana, HENRY ERNST had a conversation with Clint Howard.

3. On or about the 26th day of January, 1971, in the New Orleans Division of the Eastern District of Louisiana, TOM DUNN RAY had a conversation with Clint Howard.

All in violation of Title 18 of the

United States Code, Sections 472 and 473.

COUNT II

That on or about January 26, 1971, in Jefferson Parish, in the New Orleans Division of the Eastern District of Louisiana, HENRY ERNST with intent to defraud did unlawfully and knowingly have in his possession seven thousand three hundred fifty (7,350) counterfeited obligations of the United States, to-wit: seven thousand three hundred fifty (7,350) counterfeit Federal Reserve Notes, drawn on the Federal Service Bank of San Francisco, California, and each bearing the face value of twenty dollars ($20.00), bearing check letter "H", face plate 10, back plate 46, series 1969, bearing serial numbers L12759113A on some notes and L13323316A on other notes, well and truly knowing the same notes to be falsely made, forged and counterfeited; all in violation of Title 18 of the United States Code, Section 472.

COUNT III

That on or about January 26, 1971, in Jefferson Parish, in the New Orleans Division of the Eastern District of Louisiana, HENRY ERNST and TOM DUNN RAY did sell, transfer and deliver to Clint L. Howard seven thousand three hundred fifty (7,350) counterfeited obligations of the United States, to-wit: seven thousand three hundred fifty (7,350) counterfeit Federal Reserve Notes, drawn on the Federal Service Bank of San Francisco, California, and each bearing the face value of twenty dollars ($20.00), bearing check letter "H", face plate 10, back plate 46, series 1969, bearing serial numbers L12759113A on some notes and L13323316A on other notes, with intent that the same be

passed, published and used as true and genuine notes, knowing the said notes to be falsely made, forged and counterfeited; all in violation of Title 18 of the United States Code, Section 473.

A TRUE BILL

s/Robert E. Kramer
FOREMAN

s/Michael H. Ellis
ASSISTANT UNITED STATES ATTORNEY

s/John Lee Smith
SPECIAL ATTORNEY
U. S. Department of Justice

No. _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

THE UNITED STATES OF AMERICA

vs.

HENRY ERNST and TOM DUNN RAY

INDICTMENT

VIOLATIONS OF:

Title 18, U.S.C., §472
Title 18, U.S.C., §473

A true bill,

s/Robert E. Kramer
Foreman.

Filed in open court this _____ day of _____, A. D. 19 _____

_____
Clerk.

Bail, $ _____

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

INDICTMENT

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 71-148
versus	:	SECTION "E"
HENRY ERNST and TOM DUNN RAY	:	VIO: Title 18, U.S.C.§371 Title 18, U.S.C.§472 Title 18, U.S.C.§473
	:	Filed Mar 9, 1971

The Grand Jury charges:

COUNT I

From on or about the 30th day of December, 1970, and continuously thereafter up to and including January 26, 1971, in the Eastern District of Louisiana and elsewhere HENRY ERNST and TOM DUNN RAY, the defendants herein, in violation of Title 18, United States Code, Section 371, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit an offense against the United States, to wit: to sell, transfer and deliver false, forged and counterfeited obligations of the United States with the intent that the same be possessed, published and used as true and genuine in violation of Title 18 of the United States Code, Sections 473.

It was a part of said conspiracy that the defendants would possess and conceal falsely made, forged and counterfeited obligations of the United States with the intent to defraud, well and truly knowing the said notes to be falsely made, forged and counterfeited in violation of Title 18 of the United States Code, Section 472.

It was further a part of said conspiracy that the defendants would sell, transfer and deliver the said falsely made, forged and counterfeited obligations of the United States with the intent that the same be passed, published and used as true and genuine notes in violation of Title 18 of the United States Code, Section 473.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

OVERT ACTS

1. On or about the 2nd day of January, 1971, in Jackson, Mississippi, the defendant TOM DUNN RAY sold to Clint Howard $19,700 worth of counterfeit Twenty ($20.00) Dollar Notes.

2. On or about the 26th day of January, 1971, in the New Orleans Division of the Eastern District of Louisiana, HENRY ERNST had a conversation with Clint Howard.

3. On or about the 26th day of January, 1971, in the New Orleans Division of the Eastern District of Louisiana, TOM DUNN RAY had a conversation with Clint Howard.

All in violation of Title 18 of the United States Code, Section 371.

COUNT II

That on or about January 26, 1971, in Jefferson Parish, in the New Orleans Division of the Eastern District of Louisiana, HENRY ERNST with intent to defraud did unlawfully and knowingly have in his possession seven thousand three hundred fifty (7,350) counterfeited obligations of the United States, to wit: seven thousand three hundred fifty (7,350) counterfeit Federal Reserve Notes, drawn on the Federal Reserve Bank of San Francisco, California, and each bearing the face value of twenty dollars ($20.00), bearing check letter "H", face plate 10 and back plate 46, series 1969, bearing serial numbers L12759113A on some notes and L13323316A on other notes, well and truly knowing the same notes to be falsely made, forged and counterfeited; all in violation of Title 18 of the United States Code, Section 472.

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said notes to be falsely made, forged and counterfeited; all in violation of Title 18 of the United States Code, Section 473.

A TRUE BILL

s/Earl Mitchell Jr.
F O R E M A N

s/Michael H. Ellis
ASSISTANT UNITED STATES ATTORNEY

s/John Lee Smith
SPECIAL ATTORNEY
U. S. Department of Justice

No. _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

THE UNITED STATES OF AMERICA

vs.

HENRY ERNST and TOM DUNN RAY

INDICTMENT

VIO: Title 18, U.S.C., §472
Title 18, U.S.C., §473

A true bill,

s/Earl Mitchell, Jr.
Foreman

Filed in open court this _____day of _____, A. D. 19 _____

_____
Clerk.

Bail, $ _____

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-681

HENRY ERNST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on two counts of having possessed, sold, transferred and delivered counterfeit obligations of the United States in violation of 18 U.S.C. 472 and 473 and on one count of having conspired to commit those offenses in violation of 18 U.S.C. 371.[1] Petitioner was sentenced to concurrent terms of six years' im-

[1] A co-defendant, Tom Dunn Ray, pleaded guilty prior to trial and testified for the government.

491-904—72

prisonment.[2] The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that prior to December 1970, one John Sistrunk pleaded guilty to having dealt in counterfeit obligations. He agreed to cooperate with the government in apprehending others involved in the counterfeiting operation. In late December 1970, Sistrunk arranged a meeting in Jackson, Mississippi, between agent Clint Howard of the Treasury Department, who was acting in an undercover capacity, and co-defendant Tom Dunn Ray. Ray agreed to sell Howard $20,000 in counterfeit twenty-dollar bills. To effectuate this sale, Ray contacted petitioner and petitioner agreed to deliver $50,000 in counterfeit hundred-dollar bills which he had in his possession to Jackson, Mississippi.[3] Ray had arranged to exchange these bills with another person who had counterfeit twenties. Petitioner delivered the counterfeit hundred-dollar bills on January 1, 1971, for which he received $500. Ray then exchanged the bills as planned for counterfeit twenties and sold the twenties to agent Howard the next day. Ray, Sistrunk, and Howard agreed to a second purchase and sale of counterfeit bills as soon as the printer could produce

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[2] The sentence imposed on the conspiracy count pursuant to 18 U.S.C. 371 exceeds the statutory maximum of five years' imprisonment. This sentence, however, runs concurrently with the sentences on the other two counts which are within the statutory limitations, so petitioner's rights have not been affected by this error.

[3] Ray had an agreement with petitioner whereby Ray left counterfeit money with him "on a consignment basis," with petitioner paying him ten percent of any sales (Tr. 31–32).

the quantity and denominations desired (Tr. 34–38, 90–102, 148–153).[4]

On January 25, 1971, Ray contacted petitioner, who agreed to retrieve a package of counterfeit currency from the printer in Baton Rouge and bring it to New Orleans for $700. On January 26, Ray, Sistrunk and Howard met in New Orleans and Ray agreed to sell agent Howard $100,000 in bogus twenty-dollar bills. Ray and Sistrunk then met with petitioner and arranged for the transfer of the bills which were in petitioner's possession. That afternoon, as agreed, petitioner parked his pick-up truck in a supermarket parking lot. Agent Howard stopped at the lot and told petitioner there would be a delay in taking delivery. Petitioner responded that they should hurry up, because he wanted the stuff out of his car as quickly as possible. Treasury agent Shaddick, who was also operating undercover, then went to the market and picked up a package from petitioner's truck containing $147,000 in counterfeit currency. Petitioner and Ray were arrested later that day (Tr. 39–42, 102–108, 153–160, 189–193).

1. Petitioner raises a host of challenges to his conviction, none of which is substantial. He first contends (Pet. 19–28) that the counterfeit money picked up by agent Shaddick from his truck should have been suppressed as the result of an illegal "search and seizure." However, the evidence developed at a pre-trial hearing on petitioner's motion to suppress showed

[4] Tr. refers to the reporter's transcript of the proceedings at trial.

clearly that petitioner had consented to the pick-up, which was in accord with arrangements previously made by the coconspirators and Howard (M. Tr. 7-10, 14-20).

2. Petitioner also contends (Pet. 41-60) that the evidence was insufficient. However, the evidence summarized above showed that petitioner conspired with Ray to deliver to government undercover agents a large amount of counterfeit currency which he had in his possession, and that he did, in fact, make such delivery on January 26, 1971, by placing the currency in his vehicle at a predetermined location. The facts that Ray negotiated the sale and that the contraband was secreted in petitioner's car rather than on his person at the time of delivery do not affect his guilt.

3. The indictment initially returned by the grand jury charged petitioner with conspiracy but omitted the statute citation. Prior to arraignment a superseding indictment was filed which added only the conspiracy statute citation, 18 U.S.C. 371. It does not appear from the record that a copy of the superseding indictment was mailed to petitioner. At arraignment the penalties on each count, including the distinct penalties for conspiracy, were explained to petitioner at which time he waived the reading of the indictment (Transcript of proceedings at arraignment, March 17, 1971, pp. 2-4). Petitioner contends (Pet. 61-65) that since he failed to receive a copy of the superseding indictment containing the conspiracy citation and waived its reading at arraignment, he did not have notice of the conspiracy charge and therefore should

not have been tried for conspiracy. However, since the original indictment which petitioner did receive apprised him of the actions with which he was charged, he clearly could have suffered no prejudice from the omission of the statute citation. *Theriault* v. *United States,* 434 F. 2d 212, 213 (C.A. 5), certiorari denied, 404 U.S. 869; *United States* v. *Clark,* 416 F. 2d 63, 64 (C.A. 9); Fed. R. Crim. P., Rule 7(c). Petitioner's further claim (Pet. 77) that submission of the superseding indictment to the jury was prejudicial is without merit.

4. Prior to trial petitioner moved for discovery of all statements made to the authorities by him or co-defendant Ray and for discovery of all evidence obained from wire taps (App. 27–29).[5] He further moved for production of various other information in a bill of particulars (App. 32–37). In response (App. 39–41) the government produced all of petitioner's statements in its possession and denied the existence of any wiretaps. The trial court denied (App. 42) petitioner's other motions for production of information which sought disclosure of the government's entire case. Petitioner's assertion (Pet. 28–35) that this denial, which lay within the discretion of the court, was error has no merit. See *Overton* v. *United States,* 403 F. 2d 444, 446 (C.A. 5); *Downing* v. *United States,* 348 F. 2d 594, 599 (C.A. 5), certiorari denied, 382 U.S. 901.

[5] "App." refers to the appendix of the parties in the court of appeals.

5. Petitioner raises various objections to the admission of evidence. For example, petitioner objects (Pet. 35–38) to the admission of agent Howard's testimony (Tr. 94–95) that he was told by Sistrunk and Ray that petitioner was bringing counterfeit money to Jackson, Mississippi. This testimony, however, was plainly admissible under the co-conspirator exception to the hearsay rule. Moreover both Sistrunk and Ray testified that petitioner did deliver the bills to Jackson (Tr. 36, 149–150). Petitioner also objects (Pet. 38–41) to agent Giuffre's qualifications as an expert on counterfeit bills; he also objects to the admission of the bills on the ground that a proper chain of evidence had not been established. The record shows that agent Guiffre positively identified the bills introduced into evidence as the ones from petitioner's truck since he had marked them with the date and his initials when they were seized (Tr. 202). Agent Giuffre further testified that he had received extensive training in detecting counterfeit currency. Certification of an expert witness lies within the discretion of the trial court and there was no abuse here. *De Freese* v. *United States,* 270 F. 2d 737, 739–740 (C.A. 5), certiorari denied, 362 U.S. 944; *United States* v. *Alker,* 260 F. 2d 135, 155–156 (C.A. 3), certiorari denied, 359 U.S. 906.

6. Petitioner alleges that the trial court's refusal to give various requested instructions was error. Despite petitioner's contention (Pet. 65–71), an entrapment instruction was not necessary; there was no evidence that the government induced petitioner to commit the acts charged in the indictment. *United States* v. *Aloi-*

sio, 440 F. 2d 705, 711 (C.A. 7), certiorari denied, 404 U.S. 824; *United States* v. *Dono,* 428 F. 2d 204, 209 (C.A. 2), certiorari denied *sub nom. Bonaguro* v. *United States,* 400 U.S. 829. Instead, petitioner was engaged in the counterfeit operations prior to the purchases made by agent Howard (Tr. 32). The essence of petitioner's requested instructions on accomplice and informer testimony was charged by the trial court (Tr. 301–303). Petitioner's other objections to the charge are insubstantial, as the record shows the court properly charged on circumstantial evidence (Tr. 298), conspiracy (Tr. 310–312), possession (Tr. 314–316), knowledge of the counterfeit nature of the currency (Tr. 312, 314, 317), and aiding and abetting (Tr. 317).

7. Petitioner's contentions concerning the denial of his post-trial motions raise no issues other than those considered above.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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